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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1111-A

LEO N. MUNRO, Plaintiff-Appellee,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellant

STATEMENT UNDER RULE 13

The history of the above suit is as follows: On March 16, 1933, a præcipe for the issuance of a summons was filed in the office of the Clerk of the United States District Court for the above District at Buffalo. On the same day a copy of the summons issued pursuant to said præcipe was served on the United States Attorney at Buffalo, New York by the attorney for the plaintiff-appellee. On the same date a copy of said summons was mailed registered, addressed to the United States Attorney General, Department of Justice, Washington, D. C.

On July 26, 1933 a copy of a complaint was served upon the United States Attorney at Buffalo, New York. On February 14, 1934, a copy of an answer was served upon the attorney for the plaintiff-appellee and on the day following the original thereof was filed in the office of the Clerk of the above Court.

[fol. 2] On April 23, 1936 the original of the complaint of the plaintiff-appellee was filed in the office of the Clerk of the above Court.

On November 16, 1934 the defendant served a motion, returnable November 26, 1934, for a dismissal of the complaint and petition of the plaintiff for want of jurisdiction, alleging as the grounds therefor a bar of the limitation as prescribed in Section 19 of the World War Veterans' Act of 1924, as amended.

Affidavits were submitted in opposition to this motion and thereafter the motion was heard before District Judge Harlan W. Rippey, who rendered an opinion denying the motion, and under date of April 29, 1935 an order was entered denying the motion above mentioned.

The case was tried before District Judge John Knight and a jury at a regular term of the United States District Court for the Western District of New York, held at Buffalo, New York, the trial commencing on April 9, 1936 and ending on April 10, 1936; jury returning a verdict in favor of the plaintiff.

At the close of the plaintiff's case and at the close of the entire case, a motion was made on behalf of the defendant for a dismissal of the complaint upon the ground that the alleged cause of action was barred by reason of the limitation prescribed in Section 19 of the World War Veterans' Act of 1924, as amended.

Judgment in favor of the plaintiff was entered July 29, 1936.

[fol. 3] An appeal was taken on behalf of the defendant-appellant under date of September 3, 1936.

There have been no additional parties to the suit nor have any parties been substituted in the action.

The time of the defendant-appellant and the term of Court at which the judgment was entered has been extended by Orders for the purpose of having signed, settled and allowed a Bill of Exceptions and an Order was entered, settling the Bill of Exceptions on October 30, 1936.

IN UNITED STATES DISTRICT COURT, WESTERN NEW YORK

1111-A

LEO N. MUNRO

vs.

UNITED STATES OF AMERICA

DOCKET ENTRIES

Mar. 16, 1933. Filed præcipe for summons.
Mar. 16, 1933. Issued summons and copies.
Sept. 20, 1933. Filed note of issue—Nov. 1933 term.
Feb. 15, 1934. Filed answer.
Feb. 27, 1934. Filed note of issue—Mar. 1934 term.
Aug. 10, 1934. Filed note of issue—Nov. 1934 term.
Jan. 10, 1935. Filed notice of motion and affidavit for dismissal of complaint.

[fol. 4] Feb. 6, 1935. Filed affidavit of atty.
Feb. 6, 1935. Filed plff's memo.
Feb. 6, 1935. Filed deft's memo.
Apr. 13, 1935. Filed Opinion, Rippey, J.
Apr. 29, 1935. Filed order denying motion for order dismissing complaint—Rippey, J.
Apr. 29, 1935. Filed note of issue—May 1935 term.
Jan. 3, 1936. Filed note of issue—Mar. 1936 term.
Mar. 30, 1936. Filed deposition of F. L. Dykema (Notices of filing sent attys. Mar. 31).
Apr. 9, 1936. Trial before Judge Knight and jury.
Apr. 10, 1936. Verdict in favor of plff.
Apr. 17, 1936. Filed stipulation and order ext. time to file bill of exceptions—Knight, J.
Apr. 23, 1936. Filed complaint.
July 15, 1936. Filed order ext. time to file bill of exceptions—Knight, J.
July 29, 1936. Filed judgment—$11,730.00 for plff.—Knight, J.
Aug. 17, 1936. Filed stipulation and order modifying judgment—Knight, J.
Sept. 3, 1936. Filed notice of appeal.
Sept. 3, 1936. Filed petition and order allowing appeal—Knight, J.
[fol. 5] Sept. 3, 1936. Filed assignments of error.
Sept. 3, 1936. Filed Citation with affidavit of service.
Oct. 7, 1936. Filed summons—served Mar. 16/33.
Oct. 9, 1936. Filed order ext. time to file bill of exceptions.

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the above-named Defendant:

You are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer,

[fol. 6] judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Simon L. Adler, Judge of the District Court of the United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said Court, this 16th day of March, in the year of our Lord, one thousand nine hundred and thirty-three.

May C. Sickmon, Clerk, by Marguerite M. Wehring, Deputy Clerk. (Seal.)

Alger A. Williams, Plaintiff's Attorney, Office and Post Office Address, Ellicott Square, Buffalo, New York.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF SUMMONS

STATE OF NEW YORK,
County of Erie, ss:

Alger A. Williams, being duly sworn, deposes and says that on the 16th day of March, 1933, he served the annexed summons upon the defendant, The United States of America, by delivering to and leaving with Richard H. Templeton, United States District Attorney for the Western District [fol. 7] of New York, a true copy thereof, and that said service was made in the Federal Building in the City of Buffalo, New York, and deponent knows that at the time of such service, said Richard H. Templeton was the United States District Attorney for the Western District of New York, and that at the time thereof, deponent was over the age of twenty-one (21) years.

Alger A. Williams.

Subscribed and sworn to before me this 6th day of October, 1936. Asa M. Williams, Notary Public, Erie County, N. Y.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF SUMMONS

STATE OF NEW YORK,
County of Erie, ss:

Margaret R. Galloway, being duly sworn, deposes and says that she resides at Buffalo, New York. That on the

16th day of March, 1933, deponent served the annexed summons upon The United States of America, the defendant in the within action, by enclosing a copy thereof in a securely sealed and duly postpaid wrapper, and by having the same registered and sent by registered mail at the United States Post Office in the City of Buffalo, New York, and by depositing the same in said Post Office, so registered, and that [fol. 8] said envelope and said registered letter was addressed and directed to the United States Attorney General, Department of Justice, Washington, D. C.

Margaret R. Galloway.

Subscribed and sworn to before me this 6th day of October, 1936. Asa M. Williams, Notary Public, Erie County, N. Y.

IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiff above named complains of the defendant and for his cause of action alleges:

First. That at all the times hereinafter mentioned the plaintiff was, and now is, a resident of the City of Buffalo, Erie County, New York, and has been a resident thereof for approximately thirteen (13) years.

Second. That on or about the 3rd day of August, 1918, plaintiff duly enlisted in the United States Marine Corps, a branch of the United States Army, for participation in the World War, and upon such enlistment he was assigned to and made a member of the 95th Company, 6th Regiment, of the Marine Corps, and after such enlistment he continued to serve under the War Department of the United States and in the armed forces of the United States and in the United States Army and under the direction, control and [fol. 9] orders of the War Department of the United States, until the 25th day of June, 1919, on which date he was honorably discharged, and at the time of such discharge he was suffering from injuries received in service and from the result of physical impairments and disabilities received and contracted in and during the period of such service,

and that he was disabled during such service in the line of his duty as an enlisted man serving under the War Department of the United States and as a member of the United States Army, and that such disabilities were so contracted and received in France and Germany.

Third. That during plaintiff's service in the United States Army, as aforesaid, the defendant, through its Treasury Department, issued to him for value, a policy of insurance in the amount of Ten Thousand Dollars ($10,000.00), which said policy and the law under which it was issued provided that if the plaintiff should become totally and permanently disabled, all premiums thereon should be waived and suspended, and that plaintiff should receive during such period of disability, the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month, and that the defendant's Certificate number T-4, 092,077, was issued by the defendant to the plaintiff as evidence of said policy of insurance and as a part thereof, and that said policy was issued to and accepted by the plaintiff by and under the authority of an Act of the United States of America, entitled "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' ap- [fol. 10] proved September 2, 1914, and for other purposes," which said Act was approved October 6, 1917, and said policy was duly and properly issued and continued in force up to and until the present time and it is now in full force and effect.

Fourth. That upon the discharge of the plaintiff from the armed forces of the United States, as aforesaid, he was totally and permanently disabled as the result of said injuries and physical disabilities received as aforesaid, and that he has continued to be continuously since such time and is now permanently and totally disabled, and that he paid all premiums required to be paid under the terms of said policy up to the time of such total and permanent disability, and that he has paid all premiums required to be paid under the terms and conditions of said policy, and that he has duly complied in each and every respect with all of the terms and conditions required on his part to be performed as an incident or prerequisite to the payment to him of benefits under said policy for total and permanent disability.

Fifth. That plaintiff has duly and properly applied for payments upon said policy of insurance because of said

disability and defendant has refused to pay him anything whatsoever under said policy and he has never received anything in the form of disability payments or otherwise from the defendant under said policy because of such disability or otherwise, and on the 1st day of March, 1933, defendant [fol. 11] by its Director of Insurance definitely rejected the claim of the plaintiff based upon such disability and has refused to pay anything thereon, and that there has been a disagreement and a denial of said claim under and within the meaning of the laws, statutes and rules applicable thereto by said Director of Insurance and by the Director of the United States Veterans Bureau.

Wherefore, plaintiff demands judgment against the defendant for the sum of Ten Thousand Dollars ($10,000.00) and interest on all defaulted monthly installments, and that it be adjudged that the plaintiff is totally and permanently disabled and is entitled to all past, present and future benefits and payments of compensation under said policy of insurance because of his said disability, and that it be adjudged that said policy of insurance is in full force and effect and a valid and existing contract between plaintiff and defendant, and that plaintiff have such other or further relief, or both, as may be just and proper, together with the costs and disbursements of this action.

Alger A. Williams, Attorney for Plaintiff, Office & Post-Office Address, 658 Ellicott Square, Buffalo, New York.

MD.

Verified July 24, 1933.

[fol. 12] Due and Personal service of a copy of the within Complaint and Notice of Entry is admitted this 26 day of July, 1933.

R. H. Templeton, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER

The defendant herein, by Richard H. Templeton, its attorney, answering the complaint of the plaintiff herein:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations

contained in those paragraphs therein marked "First", "Second", "Third" and "Fifth".

Second. Upon information and belief denies the allegations contained in that paragraph therein marked "Fourth."

Wherefore, defendant demands judgment dismissing the complaint of the plaintiff herein, and further demands an affirmative judgment in favor of the defendant and against the plaintiff for the costs and disbursements of this action.

(S.) Richard H. Templeton, Esq., United States Attorney in and for the Western District of New York, Attorney for the Defendant, Office & Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 13] *Duly sworn to by Richard H. Templeton. Jurat omitted in printing.*

In United States District Court

Bill of Exceptions—Notice of Motion for Dismissal of Complaint

Please Take Notice that upon the annexed affidavit of Frederick T. Devlin, Special Attorney of the United States Department of Justice, a motion will be made by the defendant at a special term of this Court to be held in the Federal Building at Buffalo, New York on Monday, November 26, 1934 at 10:00 A. M., or as soon thereafter as counsel may be heard, for an order dismissing the petition of the plaintiff [fol. 14] herein, for want of jurisdiction in the Court to hear or determine the cause of action alleged therein.

Dated at Buffalo, N. Y., November 16, 1934.

Yours, etc., Richard H. Templeton, United States Attorney in and for the Western District of New York, and Attorney for the Defendant, Office and P. O. Address, 416 Federal Building, Buffalo, New York.

To Alger A. Williams, Esq., Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF FREDERICK F. DEVLIN

STATE OF NEW YORK,
County of Erie, ss:

Frederick T. Devlin, being duly sworn, deposes and says as follows:

That he is a Special Attorney of the Department of Justice *of* the Defendant herein, and that he has charge of the [fol. 15] defense of the above entitled action.

That an examination by deponent of the official files of the Veterans' Administration, and of the files of the United States Attorney of the Western District of New York discloses as follows:

(1) That the claim for the benefits of a policy of war risk yearly renewable term insurance was filed with the Veterans' Administration May 29, 1931.

(2) That on March 1, 1933 one H. L. McCoy, Director of Insurance, of the Veterans' Administration, wrote the claimant and this plaintiff, setting forth that the claim theretofore made had been denied.

(3) That the petition herein was served upon the United States Attorney July 26, 1933, and was filed in the office of the Clerk of this Court on or about the same date.

That because of the premises, and pursuant to the statutes in such case made and provided, the filing of the petition herein, and the commencement of this action thereby, was barred under the limitation contained in Section 19 of the World War Veterans' Act of 1924, as amended, being Title 38, U. S. C. A., Section 445.

Frederick T. Devlin.

Sworn to before me this 16 day of November, 1934.
John K. Gerken, Notary Public, Erie County, N. Y.

[fol. 16] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

STATE OF NEW YORK,
County of Erie, ss:

Alger A. Williams, being duly sworn, says:

1. I am an Attorney at Law, duly licensed to practice in this Court, and I have been so licensed to practice continuously since prior to March 16, 1933.

2. On or about the 16th day of March, 1933, the above entitled action was referred to me. I was not sure of the proper practice in this case nor of the exact date when the statute of limitations would become effective and I had no time to investigate the law at that time, nor did I have sufficient facts to prepare a complaint or petition, so I telephoned one of the Assistant United States Attorneys for the Western District of New York. I personally know all of these attorneys but I am not sure at the present time which one I talked with, but whomever I talked with advised me that I might serve the summons without the complaint or petition, and that such service would be sufficient to acquire jurisdiction and to toll the running of the statute of limitations, and that thereafter the Government would appear and I might serve my complaint or petition subsequently. I was told in other words that the same practice could be used as would apply in an ordinary New York State Supreme Court proceeding.

[fol. 17] 3. Following this advice and because I was extremely busy, I obtained a summons from the Clerk of this Court in the usual form, and I caused a copy thereof to be served upon the United States Attorney for the Western District of New York on that date, and on the same date I mailed another copy to the United States Attorney General's Office, at Washington, D. C. The copy which was sent to the Attorney General's office was sent by registered mail and according to a receipt which I have in my possession was received and receipted for by the Department of Justice at Washington on March 17, 1933.

4. After the summonses had been served I learned that Frederick T. Devlin, an Assistant United States Attorney

the Western District of New York, was in charge of
e case. I discussed the matter with him personally and
telephone on various occasions and nothing was ever
d about any irregularity of service or of the procedure.
nally I asked him why he had not served a notice of ap-
arance and he said it would not be necessary, that if I
uld serve a complaint or petition upon the local United
ates Attorney's office, that would be sufficient. Accord-
ly I prepared and served a complaint on July 26, 1933,
d on that date the United States Attorney for the West-
n District of New York admitted due and personal service
a copy of said complaint.

5. Some time thereafter a copy was served upon the
ited States Attorney General by mail.

l. 18 6. No objection was ever made thereafter, al-
ough I continued to converse with and discuss the case
h said Frederick T. Devlin, and finally on February
1934, an answer, verified by the local United States At-
ney, was served by the defendant, which was simply in
nature of a general denial and set up no affirmative de-
ses whatsoever. In the meantime in April, of 1933, a
e of issue was filed by me. The case was moved by me
a term commencing in Buffalo in November, 1933, for
other term commencing in March, 1934, and for another
m commencing in November, 1934. Copies of these
ices of trial for each of said terms were received with-
objection by the local United States Attorney, who
nitted personal service of a copy of each of said notices.
the calendar calls the cases were moved but were not
ched and no objection whatsoever was made on the part
the local United States Attorney, except that it might
e been stated by him that the Government was not
dy for trial because of lack of preparation.

. Finally on July 28, 1934, as a result of various other
ferences with said Frederick T. Devlin, and at his sug-
tion, I prepared and delivered to said Frederick T.
vlin, who accepted the same without question or com-
nt, an offer of settlement of the case, and said Frederick
Devlin advised me that the same would be submitted to
proper authorities for consideration, and that he would
ommend the acceptance of the same, and I am informed

[fol. 19] and believe that the same was submitted by him to the proper authorities.

8. On or about November 16, 1934, a motion was made by the defendant to dismiss the complaint or petition herein for want of jurisdiction. That was the first move on the part of the defendant to effect such a result, and it was the first time that the local United States Attorney or the Attorney General or the defendant had taken any such attitude toward the case, although there was ample time after the service of the summons alone for the defendant to move to dismiss the action or to vacate the service, had the defendant or the Attorney General or the local United States Attorney wanted to take this attitude, and said attitude was never intimated or stated in any conferences the deponent has ever had with said Frederick T. Devlin and, in fact, said Frederick T. Devlin has inferred that the case was properly before the Court, that service was regular and that the only question to be decided was that of disability. In the opinion of deponent the attitude of the Government at this very late date was prompted by a review of the file after the plaintiff's offer of settlement had been submitted and after the defendant had reached the conclusion that the case could not be defeated on the merits, and for the first time the defendant sought to escape a just liability upon legal technicalities after having led the plaintiff to believe that the case was properly before the Court [fol. 20] and that the plaintiff was secure in his position and in his conviction that he would sooner or later be awarded a fair trial of the issues of the case.

(S.) Alger A. Williams.

Subscribed and sworn to before me this 18th day of December, 1934. (S.) Manly Fleischmann, Commissioner of Deeds, Buffalo, N. Y.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Portion of Trial

Trial before Hon. John Knight, United States District Judge, and a jury, at the Federal Building, Buffalo, New York, commencing April 9th, 1936, 10:00 A. M.

APPEARANCES

Alger Williams, Esq.

Alexander Chapin, Esq., and Manly Fleischmann, Esq., Ellicott Square Building, Buffalo, N. Y., Attorneys for the Plaintiff.

[fol. 21] Joseph H. San, Esq., Attorney for the Department of Justice, New York City, and Henry W. Killeen, Jr., Assistant United States Attorney, Buffalo, N. Y., for the United States.

ALGER WILLIAMS, called as a witness on behalf of the plaintiff, and sworn, testified as follows:

The Witness: I am the attorney for the plaintiff in this action. This case was referred to me about March 16, 1933, and I was told at that time that there had been a denial by the Director of Insurance. I wanted to get the action started just as soon as I could, because I knew there was a varying limitation on some of these actions. I hadn't at that time sufficient chance to prepare a petition or complaint and I procured a summons and copies of a summons from the Federal clerk at Buffalo, and I served one on that date on one of the assistant attorneys for the Western District of New York. I knew at that time not only the Federal Attorney in this district, but I knew each assistant and I talked with one of those assistants. I can't recall which one it was, but it was the one that I served the summons on. I asked him if that service was proper——

Mr. San: I object to this portion of the testimony.

The Court: Well, of course, Judge Rippey in his de-
[fol. 22] cision in this case, in his opinion in this case, on the motion made, states with reference to the procedure taken in serving the summons in this suit, that this proced-

ure was followed after the plaintiff's attorney was assured by the defendant's attorney that it was in all respects proper to give the Court jurisdiction on the action.

Mr. San: The point is, your Honor, that that motion was decided by the Court upon affidavits, that wasn't upon the testimony during a trial, by which an effort is made to express the method of service. The Court had affidavits before it and that is all the Court's decision was based on. It is generally well known that affidavits very frequently transgress the strict limitations which are placed upon the introduction of testimony during a trial. Now, at a trial that motion might have been decided quite differently by Judge Rippey if he had taken testimony rather than affidavits upon those facts.

The Court: But he based his decision upon the fact that the procedure was approved by the defendant's attorney. On this I am going to exclude the proof. I don't think it is competent. I don't think that the district attorney can bind the Government as to the service.

Mr. Williams: I offer in evidence now this testimony and proof that at that time this service was made upon the [fol. 23] assistant United States District attorney for the Western District of New York.

The Court: March 10th——

Mr. Williams: On March 16th the service of the summons was made. I told him that I wasn't familiar with the practice in these cases and I asked him if I might serve the summons without the petition of complaint. I referred to it as a complaint. I asked if that was proper and it would be proper to institute an action, to toll the running of the Statute of Limitations—this was the thing that bothered me that time. I was told by this Federal attorney that it was proper and that the Government would appear in the action and admit service of my complaint, subsequent to that and within the usual time allowed by the practice of the Supreme Court of the State of New York, and that the Government would follow such practice.

The Court: Is that all?

Mr. Williams: That is on this.

Mr. San: I object to this offering of any testimony.

The Court: Objection sustained.

Mr. Williams: Exception.

Now, on the same date that I served that summons on the Deputy Attorney General I mailed another copy to the

Attorney General's office in Washington by registered mail and I have received a registered mail receipt.

[fol. 24] The Court: I suppose that is not questioned?

Mr. Williams: The registered mail receipt shows that it was received by the Department of Justice on March 17, 1933. After the summonses had been served I learned that Frederick T. Devlin, an Assistant United States District Attorney for this district, was in charge of the case. I discussed the case with him personally and by telephone and on various occasions, and nothing was ever said by him to me about any illegality of service; no criticism was made of the procedure, nor did he tell me in any way that the Court did not acquire jurisdiction, nor that there was any question of jurisdiction raised at that time or would be raised.

Mr. San: I move that that be stricken out.

The Court: I don't think that is very harmful one way or the other.

Mr. San: I will withdraw that.

Mr. Williams: After the time had passed away when I thought that the notice of appearance should have been served, I asked him why he had not served it and he said——

Mr. San: That is objected to.

The Court: All right.

Mr. Williams: Then as to the notice of appearance, he said that it would not be necessary. He said, "You don't [fol. 25] want a notice of appearance. You know you don't need it, so that if you will serve your complaint, at that time I will give you an admission due proof of service on it." According to that, I prepared it and served it.

Mr. San: I object to that.

The Court: Sustained. Exception to the plaintiff.

Mr. Williams: Exception.

I prepared and served the complaint which is before your Honor on July 26, 1933, and on that day due proof of service of the copy of the complaint was admitted by R. H. Templeton, attorney for the defendant. I call your Honor's attention to that admission of service on this original in this case.

The Court: All right.

Mr. Williams: Shortly after that—some time after that it was served on one of the assistant attorneys.

The Court: That was on the attorney's signature?

Mr. Williams: I don't know.

The Court: It appears to be signed.

Mr. Williams: I think it was signed. The admission was given by one of the attorney's assistants. I believe, in the office. Some time after that a copy was mailed to the United States Attorney General at Washington. After that time I continued to converse with Devlin and discussed the case with him. Finally, on September 16, 1934, [fol. 26] an answer was served, which is the answer in this case, and I call your Honor's attention to the fact that it was in the nature of a general denial and no affirmative defenses. In the meantime, on April of 1933 a note of issue was filed by me. The case was moved by me for the term commencing in Buffalo in November of 1933; for another term commencing March, 1934, and for another term commencing in November of 1934. Copies of the notices of trial—each of the notices of trial for each term—were received without objection by the local United States attorney's office and proof of service——

Mr. San: I object to that portion of the statement which says that they were received without objection.

The Court: State that they were mailed.

Mr. Williams: Were served on the local United States attorney's office and the local office admitted personal service of a copy of each of said notices. I attended calendar calls at these terms and I moved this case for trial and the case wasn't reached, although there was, as I recall, some discussion in Court about it. No objection was made at any of these calendar calls on the part of the United States, or on the part of the defendant or any Federal attorney, except this, I believe that at one time Mr. Devlin stated that he was not ready to try the case, but only because it wasn't ready, not because of any other question [fol. 27] involved in the case. On July 28, 1934, after further conferences with Mr. Devlin, and at his suggestion, as a result of one of these conferences, I prepared and delivered to him as Assistant Federal attorney, an offer of the settlement of the case.

Mr. San: That is objected to. Clearly, an attempt to compromise, an offer of settlement, never has been part in the trial of a suit.

The Court: I will sustain the objection on the ground that I have indicated heretofore. Objection sustained. Exception to the plaintiff.

Mr. Williams: Exception. I offer to prove that the offer of settlement was delivered to Mr. Devlin, who advised me that the same would be submitted to the proper authorities for consideration and that he would recommend the acceptance of the same, and after that time the offer was submitted, but was rejected.

Mr. San: That is all objected to.

The Court: Objection sustained. An exception to the plaintiff.

Mr. Williams: Another motion—no criticism, no objection of any kind was ever taken to the complaint, the summons, the procedure or anything else in the case in the nature of a procedural nature.

Mr. San: That is objected to, and may it be stricken out?

[fol. 28] The Court: No, I am going to let that stand.

Mr. Williams: —of which I was informed.

The Court: At what time?

Mr. Williams: Until the 16th of November, 1934.

The Court: I will let that stand.

Mr. San: I respectfully except.

Mr. Williams: At that time a motion was made by the defendant to dismiss the complaint or petition for want of jurisdiction. Now, I would like in closing—I would like to ask, maybe I had better get off the witness stand here now.

The Court: All right. There are no questions to ask, anyway.

Mr. Williams: At the time that this former motion was made it was considered and decided by Judge Rippey and he had before him various affidavits and papers which he considered. Now, I ask your Honor in determining the questions, the motions, in this case to consider the same papers that were before Judge Rippey—both in behalf of the Government and in behalf of the plaintiff.

The Court: Well, I don't think those affect our position, at all. I think the proceedings before Judge Rippey are a matter of record in the case.

Mr. Williams: That is true.

[fol. 29] The Court: I don't think I wish to do that. I don't think I should consider those affidavits on this motion. As a matter of fact, we are offering evidence here and

applying the question of the Statute of Limitations—it is clear what the point is here.

Mr. Williams: Well, I just want to get a ruling on that.

The Court: I decline to do that.

Mr. Williams: May I have an exception? Now, then, I offer in evidence——

The Court: I don't mean by that that all the papers and also those things are before me. I am speaking about the affidavits,——

Mr. Williams: That is right.

The Court: That motion I declined to review.

Mr. Williams: I now offer in evidence—I offer to produce the original if there is any question—of my affidavit of December 18, 1934, which was given to and considered by Judge Rippey on the Government's motion to dismiss, the motion I mentioned before.

Mr. San: That is objected to.

The Court: Objection sustained. An exception to the plaintiff.

Mr. Williams: Well, is the objection on the ground that it is not the original?

Mr. San: No.

Mr. Williams: You don't raise that question? I take an exception and ask to have this affidavit marked for identification.

[fol. 30] (Affidavit of Mr. Alger Williams, dated December 18, 1934, received as Plaintiff's Exhibit No. 19 for Identification.)

Cross-examination.

By Mr. San:

Q. In March, 1933, when the summons was served in this action did you know under what act the suit was authorized in behalf of the plaintiff suing for the benefit of War Risk Insurance Policy?

A. No, I didn't. I thought it was under the War Risk Insurance Act.

Q. Did you prior to the service of the summons—did you make any effort to look up and find out what law applied to the suit which you were about to commence?

A. No.

Mr. San: That is all.
The Court: That is all.

(Proceedings adjourned until tomorrow, April 10, 1936, at 10:00 A. M.)

Mr. Williams: The plaintiff rests.

MOTIONS TO DISMISS

Mr. San: I move, your Honor, to dismiss the action on the ground that the plaintiff has failed to make out a prima facie case and also on the ground that the suit was not commenced within the time provided for in Section 19 of the World War Act.

The Court: Motion denied.

Mr. Williams: That is all. We rest, your Honor.

[fol. 31] The Court: Anything further?

Mr. San: I now renew the motion to dismiss the complaint on the grounds set forth at the end of the plaintiff's case.

The Court: Same disposition. I will deny it and leave it to the jury.

Mr. San: Exception.

IN UNITED STATES DISTRICT COURT

George L. Grobe, (Frank Devlin), United States Attorney, for the Government for motion.

Alger A. Williams and Manly Fleischmann, for plaintiff opposed.

OPINION ON MOTION TO DISMISS COMPLAINT

RIPPEY, D. J.:

This is an action brought on a policy of War Risk Insurance. Plaintiff is a resident of the Western District of New York; thus the suit is brought in the right district. Congress has conferred jurisdiction on this Court over the subject matter of the action (38 U. S. C. A. 445). Thus, the jurisdiction of this Court is exclusive (U. S. v. Pfitsch, 256, U. S. 547, 552).

Sec. 445 of Title 38 U. S. C. A. also provides that "The procedure in such suits shall be the same as that provided [fol. 32] in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable." Section 762 provides, so far as applicable, that "The plaintiff in any suit brought" * * * "shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides." Sec. 763 provides, among other things, that "The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter."

Despite the following facts, defendant moves to dismiss the suit for want of jurisdiction. On March 16, 1933, a summons was procured by plaintiff from the clerk of this court in due form and served on the District Attorney for the Western District of New York and on the same day a copy was mailed to the Attorney General of the United States by registered mail and received by him on March 17, 1933. No complaint or petition was served with the summons. Time for commencement of the suit expired on April 5, 1933 and up to that time no complaint or petition had been served. Service of a summons under the law of the State of New York constitutes the commencement of an action (see 16 C. P. A.), and the issuance by the clerk of the writ or summons under seal and its service according to State [fol. 33] practice is the commencement of the action under Federal practice (28 U. S. C. A. 721, 722) under the Conformity Act. This procedure was followed after plaintiff's attorney was assured by the District Attorney that it was in all respects proper to give the court jurisdiction of the action. Complaint was personally served on the United States Attorney on July 26, 1933 and due and personal service admitted and a copy was duly served on the United States Attorney General by registered mail. On February 16, 1934 an answer, duly verified by the U. S. Attorney, was served on the attorney for plaintiff. It raised no question of jurisdiction and contained no defense that the statute of limitations had run before the service of the complaint. The case was on the November, 1933,

and March and November, 1934 calendars of this court for trial without objection. Down to the time of the making of this motion no objection has been made by defendant to the regularity of the proceedings. It is now too late.

A complaint or petition was served in the manner and upon the persons required by Sections 762 and 763, Title 28, U. S. C. A. and the government appeared and answered to the merits. The time limitation within which the suit could be brought was an affirmative defense. To take advantage of failure to commence the action in time the government was required to plead it affirmatively (N. Y. C. PA.) 242: Rodger v. Bliss, 130 Misc. 168, 223 Supp. 401. This it has not done.

[fol. 34] Whether there were defects in the commencement of the suit is immaterial. The provisions of Sections 762 and 763 were purely procedural and not jurisdictional and the government could and did waive any such defects by its general appearance and answer to the merits (Little v. U. S., 54 Fed. (2d) 711: Farrar & Brown v. U. S., 3 Peters (28 U. S.) 459; Thames & Murray, Ins. Co., 237, U. S. 19, 24; U. S. v. N. Y. & O. S. S. Co., 216 Fed. 61; U. S. v. Hooslof, 237 U. S. 19, 24; Everett Ry. Co. v. U. S., 236 Fed. 806; Buckley v. Reid, 133 Fed. 696; Mackay & Uinta Co., 229 U. S. 173.)

The motion must be denied and it is so ordered.

Dated, April 11th, 1935.

Harlan W. Rippey, U. S. D. J.

In United States District Court

Order Denying Motion to Dismiss—April 25, 1935

Present: Hon. Harlan W. Rippey, District Judge.

The defendant herein having heretofore moved this Court for an order dismissing the petition of the plaintiff herein, [fol. 35] for want of jurisdiction in the Court to hear and determine the cause of action alleged in said petition, and said motion having come on to be heard, and due deliberation having been had, and both parties having submitted Briefs, and on reading and filing the notice of motion dated November 16, 1934, the affidavit of Alger A. Williams veri-

fied the 18th day of December, 1934, the summons, petition and answer herein and all the other proceedings had herein, and after hearing Frederick T. Devlin, Special United States Attorney, in support of said motion and Alger A. Williams, by Manly Fleischmann of counsel, in opposition thereto; Now, on motion of Alger A. Williams, it is

Ordered that the defendant's motion be, and the same hereby is, in all respects denied.

Harlan W. Rippey, Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

JUDGMENT

The above entitled action having duly come on for trial before the Honorable John Knight, United States District Judge and a jury, at the Federal Building, in Buffalo, on the 9th day of April, 1936, and the trial of the issues herein having continued until April 10th, 1936, at which time said issues were submitted to the jury for determination, and the jury having returned a verdict of "cause of action" [fol. 36] in favor of the plaintiff and against the defendant, and the defendant's motion to dismiss the complaint which was made just prior to the production of any testimony having been denied, and the defendant's motion to dismiss the complaint made at the conclusion of the plaintiff's case having been denied, and the defendant's motion to dismiss the complaint and for a directed verdict at the conclusion of all of the evidence having been denied, and the defendant's motion to set aside the verdict after the rendition thereof having been denied, and it appearing from the evidence that the plaintiff held defendant's certificate T-4,092,077 evidencing a policy of War Risk Insurance and that plaintiff became totally and permanently disabled on or before the 1st day of July, 1919, and said verdict having been returned during the said month of April, 1936;

Now, Therefore, on motion of Alger A. Williams, attorney for the plaintiff, and upon all of the pleadings and proceedings had and filed herein, it is

Ordered, Adjudged and Decreed, that the plaintiff have, and is hereby granted, judgment against the defendant for

the sum of $11,730.00, and that the fees of the said Alger A. Williams, attorney for said plaintiff, are hereby fixed at ten per cent (10%) of such amount and of all further payments to plaintiff under the policy in suit, and that said Alger A. Williams as such attorney have, and he is hereby given a lien on said sum so awarded to the plaintiff to the [fol. 37] extent of $1,173.00, and ten per cent (10%) of all such further payments, and that said sums may be paid directly to him with the same effect as though paid directly to the plaintiff.

Dated, July 17, 1936.

(Sgd.) John Knight, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

SIRS:

You Will Please Take Notice that the defendant in the above entitled action hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from a judgment of this Court in favor of the plaintiff, entered in the office of the Clerk of the District Court of the United States for the Western District of New York, on the 29th day of July, 1936, and from each and every part of said judgment.

Dated, Buffalo, New York, September 3, 1936.

(S.) George L. Grobe, United States Attorney in and for the Western District of New York, Attorney for Defendant, Office & Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 38] To Alger A. Williams, Attorney for Plaintiff, 664 Ellicott Square Building, Buffalo, New York, and to May C. Sickmon, Clerk, District Court of the United States, for the Western District of New York.

IN UNITED STATES DISTRICT COURT

PETITION AND ORDER ALLOWING APPEAL

The United States of America, defendant above named, a sovereign corporation, by George L. Grobe, United States Attorney for the Western District of New York, its attor-

ney, feeling aggrieved by the judgment of this Court, made and entered in the above entitled action in the office of the Clerk of the District Court of the United States for the Western District of New York on the 29th day of July, 1936, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the accompanying Assignments of Error, forming a part hereof, and the defendant therefore prays that this, its petition for appeal, may be allowed, and that a transcript of the records in the proceeding herein, upon which said judgment was based and entered, may be transmitted with this appeal to the said United [fol. 39] States Circuit Court of Appeals for the Second Circuit.

Dated, Buffalo, New York; September 3, 1936.

George L. Grobe, United States Attorney for the Western District of New York, Attorney for the Defendant.

The foregoing petition is hereby allowed and it is so Ordered.

Dated, Buffalo, New York, September 3, 1936.

John Knight, United States District Judge.

Citation, in usual form, omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes the defendant above named by its attorney, George L. Grobe, United States Attorney for the Western District of New York, and makes and files the following Assignments of Error upon which it will rely for the prosecution of its appeal from the judgment of this Court, made and entered in the office of the Clerk of the United States District Court for the Western District of New York, on the 29th day of July, 1936.

1. The District Court of the United States erred in making and entering its order in the above styled suit, filed April 29, 1935, which said order denied a motion of the

defendant filed November 16, 1934 for a dismissal of the petition of the plaintiff for want of jurisdiction to hear and determine the cause of action alleged in the petition and which said motion was made upon the ground that the alleged cause of action set forth in the petition was barred [fol. 41] under the limitation contained in Section 19 of the World War Veterans' Act of 1924 as amended, Title 38, U. S. C. A., Section 445.

2. The District Court of the United States erred in denying the motion of the defendant for a dismissal made at the close of the plaintiff's case upon the ground that the suit was not commenced within the time provided for in Section 19 of the World War Veterans' Act.

3. The District Court erred in denying the motion of the defendant, made at the close of the entire case, for a dismissal of the complaint upon the same grounds set forth in support of the same motion made at the close of the plaintiff's case, namely, that the suit was not commenced within the period or time prescribed by Section 19 of the World War Veterans' Act.

Wherefore, the defendant prays for a reversal, with costs, of the judgment of the District Court of the United States for the Western District of New York, made and entered in the above entitled case on the 29th day of July, 1936, and for such other and further relief as to the Court may seem just.

Dated, Buffalo, New York, September 3, 1936.

George L. Grobe, United States Attorney in and for the Western District of New York, Attorney for the Defendant, Office and Post Office Address, 416 Federal Building, Buffalo, New York.

[fol. 42] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—April 16, 1936

It is Hereby Stipulated by and between the attorneys for the parties to the above entitled action, that an Order may be made and entered herein without further notice, extending the regular term of the United States District Court for the Western District of New York, held in and

at the City of Buffalo, in said District, commencing on March 10th, 1936, for ninety days from the date herein, for the purpose of having allowed, settled and signed a Bill of Exceptions in the above styled action, and further providing that the time within which the Defendant herein may have signed, settled and allowed a Bill of Exceptions is extended to ninety days from the date herein.

Dated April 16, 1936.

(S.) Alger A. Williams, Attorney for Plaintiff.
(S.) George I. Grobe, Attorney for Defendant, by Henry W. Killeen, Jr., Ass't U. S. Attorney.

It is so Ordered. (S.) John Knight, United States District Judge.

[fol. 43] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—July 14, 1936

It is Hereby Stipulated by and between the attorneys for the parties to the above entitled suit that an Order may be entered without further notice extending the time of the defendant, within which it may have settled, signed and allowed a Bill of Exceptions, 90 days from the date hereof and further extending the March, 1936, term of United States District Court for the Western District of New York, at which term the above styled suit was tried, 90 days from the date hereof for the same purpose.

Dated July 14, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant, by Joseph J. Doran, Asst. U. S. Attorney.

It is so Ordered. John Knight, United States District Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER EXTENDING TERM—October 9, 1936

It is Hereby Stipulated, by and between the attorneys for the parties to the above entitled suit, that an order may be entered without further notice extending the time of the defendant within which it may have settled, signed and

allowed a Bill of Exceptions ninety days from the date hereof, and further extending the Term of Court at which said judgment was rendered and entered, for that purpose, ninety days from the date hereof.

Dated October 9, 1936.

(S.) Alger A. Williams, Attorney for Plaintiff.

(S.) George L. Grobe, Attorney for Defendant.

It is so Ordered. John Knight, United States District Judge.

In United States District Court

Stipulation and Order Settling and Allowing Bill of Exceptions

It is Hereby Stipulated and Agreed by and between the [fol. 45] attorneys for the respective parties to the above entitled action that the foregoing Bill of Exceptions contains the evidence given on the trial of this case as agreed upon by the parties for the purpose of having settled and allowed a Bill of Exceptions, and that it is correct in all respects, and that the same further contains the rulings of the District Judge presiding at the trial of the above cause and the Exceptions taken by the parties to such rulings as agreed upon, and that the same may be allowed, settled and ordered filed.

Dated, Buffalo, New York, November 5, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant.

Upon the foregoing Stipulation, and on motion of George L. Grobe, attorney for the defendant, I hereby sign, settle and allow the foregoing as and for the defendant's Bill of Exceptions, and order the same to be filed.

Dated, November 5, 1936.

John Knight, U. S. D. J.

[fol. 46] In United States District Court

Stipulation and Order as to Record

It is Hereby Stipulated by and between the attorneys for the parties herein that the foregoing Record contains all of

the papers, evidence and exhibits necessary for the determination of this appeal, as agreed upon by counsel for the parties, with the reservation that either party may submit the originals or photostatic copies of any or all exhibits received in evidence at the trial of the cause.

Dated, Buffalo, New York, November 5, 1936.

Alger A. Williams, Attorney for Plaintiff. George L. Grobe, Attorney for Defendant.

On reading the foregoing consent of the attorneys for the respective parties hereto, it is

Ordered that the foregoing printed Record be filed in lieu of the original papers for the purpose of certifying a Record on Appeal.

Dated, November 5, 1936.

John Knight, U. S. D. J.

[fol. 47] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued March 15, 1937. Decided April 12, 1937

No. 251

LEO N. MUNRO, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal by the United States from a judgment for the plaintiff in an action upon a contract of war risk term insurance. Judgment reversed.

Julius C. Martin, Director, Bureau of War Risk Litigation, of Washington, D. C. (George L. Grobe, U. S. Atty., of Buffalo, N. Y., Joseph J. Doran, Asst. U. S. Atty., of Rochester, N. Y., Julius C. Martin, Director, Bureau of War Risk Litigation, of Washington, D. C., and Wilbur C. Pickett and Fendall Marbury, Sp. Assts. to Atty. Gen., on the brief), for the United States.

Alger A. Williams, of Buffalo, N. Y. (Charles H. Kendall, of Buffalo, N. Y., of counsel) for appellee.

SWAN, Circuit Judge:

This is an action upon a contract of war risk term insurance brought in the District Court. Before the case was reached for trial the defendant moved for dismissal upon the ground that suit had not been commenced within the time prescribed by section 19 of the World War Veterans' Act of 1924, as amended; 38 U. S. C. A. §§ 445, 445d. This motion was overruled by Judge Rippey. Munro v. United States (D. C.) 10 F. Supp. 412. At the trial the motion was renewed before Judge Knight, who, following Judge Rippey, properly denied it. The correctness of these rulings is the only question presented by the appeal.

The plaintiff concedes that under the statute the action had to be brought not later than July 1, 1933. The facts

giving rise to the dispute whether it was so brought are the following: On March 16, 1933, a præcipe for the issuance of a summons was filed in the office of the clerk of the District Court, and on the same date a copy of the summons issued pursuant thereto was served upon the United States attorney in Buffalo, and another copy was sent by registered mail to the Attorney General in Washington, D. C.; but no copy of the complaint was served upon the United States attorney until July 26, 1933, and the original of the complaint was not filed in the office of the clerk of the court until April 23, 1936, after the trial. On February 15, 1934, the United States attorney filed the defendant's answer without raising any question as to the timeliness of the suit, but about a year later moved to dismiss for lack of jurisdiction. This was the motion which Judge Rippey overruled. The trial was had in April, 1936, and judgment was entered July 29, 1936. In following the above-described procedure the plaintiff's attorney acted upon information obtained from an assistant United States attorney who told him that service of the summons would be sufficient to give the court jurisdiction and toll the statute of limitations and that the [fol. 49] complaint or petition might be served subsequently.

The questions thus presented are two: First, whether procuring a summons, serving a copy thereof on the United States attorney, and sending a copy to the Attorney General by registered mail constituted a commencement of suit against the United States; and, second, if it did not, whether the United States has waived the defense that the suit was not brought within the time specified by section 19 of the World War Veterans' Act of 1924 as amended.

Said section 19 as amended by the Act of July 3, 1930 (46 Stat. 992, 38 U. S. C. A. § 445), provides that an action on a war risk insurance claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the federal District Court for the district in which the claimant resides. It also provides that "the procedure in such suits shall be the same as that provided in sections 5 and 6 [sections 762 and 763 of Title 28]" of the Tucker Act of 1887, "and section 10[1] thereof [section 765

[1] Section 10 (see 28 U. S. C. A. § 765) is thought not pertinent to the present discussion.

of Title 28] in so far as applicable." Section 5 of the Tucker Act says that the plaintiff "shall file a petition" with the clerk of the court in the proper district, containing, among other things, a succinct statement of the facts on which the claim is based, and section 6 says he shall cause a copy of his petition filed under the preceding section to be served upon the district attorney and shall mail a copy, by registered letter, to the Attorney General. 24 Stat. 506, 28 U. S. C. A. §§ 762, 763. It is obvious that these provisions were not complied with before July 1, 1933. Indeed, the requirement that a copy of the petition be mailed to the Attorney General does not appear to have been complied with at any time—although this might not be fatal if the other requirements were fulfilled. Cf. Little v. United States, 54 F. (2d) 711 (D. C. W. D. La.)

The appellant contends that the procedure prescribed by sections 5 and 6 of the Tucker Act (28 U. S. C. A. §§ 762, 763) are mandatory in prescribing how personal jurisdiction over the United States shall be obtained in an action brought in the District Court; while the plaintiff urges that the Conformity Act (28 U. S. C. A. § 724) makes applicable the procedure of the New York Civil Practice Act, pursuant to which actions are begun by service of summons. To the plaintiff's argument it may be answered that, literally, the Civil Practice Act does not, and could not, provide any method of suing the United States, or of serving a summons upon the United States. Upon a broader basis it may be answered that, when the United States consents to be sued, it may impose such restrictions upon the manner of bringing suit as it sees fit (Reid v. United States, 211 U. S. 529, 538, 29 S. Ct. 171, 53 L. Ed. 313), and that the reference to sections 5 and 6 of the Tucker Act, specifically designating the procedure to be followed in a suit based on a war risk insurance contract, precludes the adoption of any other. As an original question, we should entertain no doubt that this is the correct conclusion and that the suit cannot be deemed to have been "brought" until, at the least, a copy of the petition was served on the district attorney.

The authorities are in some confusion. The greater number of decisions, and in our opinion the better reasoned, support the view above expressed. In several, it has been held that service of a summons upon the district attorney is an unauthorized method of beginning suit against the

United States, and motions to quash the service have been granted. National Casket Co. v. United States, 263 F. 246 (D. C. S. D. N. Y.); Cassarello v. United States, 265 F. 326 (D. C. M. D. Pa.); Reid Wrecking Co. v. United States, 202 F. 314 (D. C. N. D. Ohio); Whalen Paper & Pulp Mills v. Davis, 53 App. D. C. 84, 288 F. 438; Miller v. United States, 11 F. Supp. 924 (D. C. W. D. N. Y.). In others, where the question was the same as in the case at bar, namely, whether the action was brought in time, it has been held directly or by intimation that the procedure of sections 5 and 6 of the Tucker Act (28 U S. C. A. §§ 762, 763) must be followed. Walton v. United States, 73 F. (2d) 15 (C. C. A. 8); Tyson v. United States, 76 F. (2d) 533 (C. C. A. 4), affirmed 297 U. S. [fol. 50] 121, 56 S. Ct. 390, 80 L. Ed. 520; Creasy v. United States, 4 F. Supp. 175, 179 (D. C. W. D. Va.); Spencer v. United States, 14 F. Supp. 46, 47 (D. C. D. Mass); Henry v. United States, 15 F. Supp. 651 (D. C. M. D. Pa.). On the other hand, Judge Dickinson held in Mill Creek & M. N. & R. Co. v. United States, 246 F. 1013 (D. C. E. D. Pa.), that a suit for recovery of illegally collected taxes was timely brought against the United States by the issuance of a summons and service thereof on the district attorney in accordance with Pennsylvania practice. This decision was cited with approval by Judge Knox in Bennett Day Importing Co. v. United States, 8 F. (2d) 83 (D. C. S. D. N. Y.), and Judge Rippey reached the same result in the case at bar and in Miller v. United States, 13 F. Supp. 684 (D. C. W. D. N. Y.). Upon a direct writ of error to the Supreme Court, Judge Dickinson's decision was affirmed in a per curiam opinion, United States v. Mill Creek & M. H. N. & R. Co., 251 U. S. 539, 40 S. Ct. 118, 64 L. Ed. 404; but we think that such affirmance must be construed only as a holding that the District Court had jurisdiction of the subject matter of the suit without consideration of the question whether the United States had been properly brought into court before the statute of limitations had run. This follows from the fact that affirmance was upon the authority of United States v. Larkin, 208 U. S. 333, 28 S. Ct. 417, 52 L. Ed. 517. There a direct writ of error brought up a judgment of a District Court dismissing an information for the forfeiture of smuggled jewels on the ground that no lawful seizure of the jewels had been made within the Cleveland district. It

was held that a controversy whether there had been a lawful seizure in that district did not involve the jurisdiction of the District Court as a federal court. Hence the case was appealable to the Circuit Court of Appeals, and, since an appeal had already been taken to that court, the writ of error was dismissed without considering the validity of the seizure. Therefore we conclude that the affirmance of the Mill Creek Case has not settled the question with which we are presented; and for the reasons and on the authorities above mentioned we hold that the plaintiff did not bring his action within the time required by section 19 of the World War Veterans' Act as amended.

It remains to consider whether the delay was waived by the statement of an assistant district attorney that service of a summons would toll the statute, or by the filing of an answer of general denial after the copy of the petition had been served upon the district attorney. The answer must be in the negative. When Congress requires a suit against the United States to be brought within a specified time, the time limitation is a condition upon the court's jurisdiction and operates as a bar to judgment without being pleaded. Finn v. United States, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128. It may not be abrogated by estoppel, nor waived. Lynch v. United States, 80 F. (2d) 418 (C. C. A. 5), certiorari denied 298 U. S. 658, 56 S. Ct. 683, 80 L. Ed. 1384; United States v. Trollinger, 81 F. (2d) 167 (C. C. A. 4); United States v. Valndza, 81 F. (2d) 615 (C. C. A. 6); Henry v. United States, 15 F. Supp. 651 (D. C. M. D. Pa.); Spencer v. United States, 14 F. Supp. 46 (D. C. D. Mass.). The cases relied upon by the plaintiff to establish waiver are manifestly different. Most of them relate to matters of venue, as in United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, and United States v. New York & O. S. S. Co., 216 F. 61 (C. C. A. 2). We do not think that United States v. Ellison, 74 F. (2d) 864, at page 869 (C. C. A. 4), certiorari denied 295 U. S. 750, 55 S. Ct. 829, 79 L. Ed. 1695, contradicts our conclusion, for the court seems to have assumed that, if the issue of timeliness had been raised, the paintiff could have proved his right to sue. Compare the later decision by the same court in United States v. Trollinger, 81 F. (2d) 167.

For the foregoing reasons, the judgment must be, and is, reversed and the cause remanded.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

LEO N. MUNRO, Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and cause remanded for a new trial.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 52] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Leo N. Munro vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 19, 1937. William Parkin, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Leo N. Munro,

Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-sixth day of June, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

D. E. Roberts, Deputy Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 54] Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,699. U. S. Circuit Court of Appeals, Second Circuit. Term No. 218. Leo N. Munro, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 15, 1937. Term No. 218, O. T., 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Leo N. Munro respectfully shows:

A.

Summary Statement of Matter Involved.

This is an action upon a policy of war risk insurance under which your petitioner claims indemnity for total and permanent disability. The judgment of the United States District Court for the Western District of New York, in favor of your petitioner (R. 35), has been reversed by the

United States Circuit Court of Appeals for the Second Circuit (R. 53), upon the ground that this action was not brought within the time limited therefor by Act of Congress (R. 48-52).

It is not disputed that this action should have been commenced on or before July 1, 1933. On March 16, 1933, petitioner caused a summons to be issued by the Clerk of the District Court at Buffalo, which summons was entitled in this action and, on the same day, was served upon the United States Attorney at Buffalo and the United States Attorney General, Department of Justice, Washington, D. C. (R. 5). This practice was adopted upon the specific instructions of an Assistant United States Attorney at Buffalo (R. 23). Thereafter the respondent failed to appear in the action and, upon inquiry, counsel for your petitioner was assured that due service of the complaint would be admitted by the respondent (R. 25). The complaint herein was served July 26, 1933, and an admission of due service was endorsed thereon by the United States Attorney at Buffalo (R. 12).

On February 16, 1934, respondent served an answer denying the allegations of petitioner's complaint, and setting up no affirmative defenses (R. 12). On November 16, 1934, respondent moved to dismiss the complaint upon the ground that the action was barred by the statute of limitations (R. 13). The motion was denied by the Hon. Harlan W. Rippey, one of the Judges of the United States District Court for the Western District of New York (Opinion R. 31, Order R. 34). The action was brought to trial before the Hon. John Knight, Judge of the District Court, and a jury, on April 9, 1936 (R. 20). The respondent's motions upon the trial for dismissal of the complaint upon the ground that suit was not commenced within the time limited therefor were denied (R. 30), and a judgment in

favor of your petitioner based upon the verdict of the jury was entered July 17, 1936 (R. 35).

The respondent appealed from the judgment of the District Court to the Circuit Court of Appeals for the Second Circuit, and the Court of Appeals reversed the judgment below (R. 53), holding that the action was not timely brought and that the delay was not waived by the respondent (R. 48-52).

B.

Reasons Relied on for the Allowance of the Writ.

(1) In holding that an action against the United States under the Tucker Act (28 U. S. C. A. Sec. 762) cannot be commenced by the service of a summons, the Circuit Court of Appeals decided an important Federal question probably not in accord with the decision of this Court in *United States* v. *Mill Creek and Mine Hill Navigation & R. R. Co.*, 251 U. S. 539, 40 Supreme Court 118, 64 L. Ed. 404.

(2) The lower courts are not in agreement as to the propriety of commencing an action such as this by the service of a summons. The Circuit Court, in its opinion, notes that "The authorities are in some confusion" (R. 50). The conflict, real or apparent, between the *Mill Creek* case and the decision below in this case should be resolved by this Court.

(3) The applicability of the Conformity Act (28 U. S. C. A. Sec. 724) to suits against the United States to enforce contractual rights, constitutes an important question of Federal law which has not been, but should be, settled by this Court.

(4) The opinion of the Circuit Court of Appeals in this case discloses a logical conflict between the theories upon which its decision is based, for it is held, first, that the

Mill Creek case is not controlling here because that case merely decided that the District Court had jurisdiction of the action brought by service of a summons (R. 51-52) and, second, that the United States Attorney in this action could not waive the irregularity in petitioner's procedure because the time limitation contained in the statute was a condition upon the court's jurisdiction.

(5) Whether, in an action brought subject to the procedural requirements of the Tucker Act, the service of a summons is a defect in process subject to cure by a general appearance under the rule of *Farrar & Brown* v. *U. S.*, 3 Pet. 459, 7 L. Ed. 741, is an important question of Federal law which has not, but should be, settled by this Court.

(6) In this action upon a contract entered into by the United States for a money consideration, the Circuit Court of Appeals has held that the conduct of respondent's judicial officers, in representing to petitioner's counsel that this action was properly commenced by the service of a summons, by failing to move against petitioner's process until after the period of limitations had run, by admitting due service of petitioner's complaint and by answering to the merits of petitioner's cause of action did not and could not estop the respondent from setting up the defense of the statute of limitations. This application of the doctrine of sovereign immunity is contrary, at least in principle, to the decision of this Court in *Lynch* against *U. S.*, 292 U. S. 571, 54 Supreme Court 78.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit in this action.

LEO N. MUNRO,
Petitioner,
GEORGE CLINTON, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions.

One opinion herein was delivered by the District Court. It is that of the Hon. Harlan W. Rippey accompanying his denial of the respondent's motion for a dismissal of the complaint before trial. It is reported in 10 Fed. Supp. at page 412 and appears in the record at page 31. The opinion of the Circuit Court of Appeals, Judge Swan writing, Judges L. Hand and A. Hand concurring, is reported in 89 Fed. Rep., 2nd Series, at page 614 and appears at page 48 in the record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347).

Facts.

The facts are stated in the petition hereinabove, at page 1. The attention of the Court is respectfully directed to some circumstances of peculiar importance:

(a) Petitioner's summons was served some three months before the statute of limitations ran against his claim.

(b) The respondent did not move against the summons herein during the period within which a new action might have been brought by the petitioner, nor until more than a year after service of the complaint.

(c) Petitioner's attorney was orally assured by a judicial officer of the respondent that the practice adopted by petitioner was proper and sufficient to give the District Court jurisdiction.

(d) The respondent, by its attorney, admitted due service of the complaint.

(e) Respondent's answer, served more than six months after the complaint, and almost a year after the summons, consisted solely of a general denial of the allegations of petitioner's complaint.

Questions Presented.

1. Whether an action against the United States upon a policy of war risk insurance can be commenced in the United States District Court for the Western District of New York by the service of a summons.

2. Whether the irregularities in petitioner's procedure or his delay in bringing suit have been waived by the respondent.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals herein conflicts with an earlier decision of this Court.

This action was brought under the authority of the World War Veterans' Act, Section 19 (38 U. S. C. A., Sec. 445), which reads in part, as follows:

> "In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable."

The foregoing *confers jurisdiction* upon the District courts to entertain actions such as this, and provides that the *procedure* therein shall accord with the Tucker Act (28 U. S. C. A. Sec. 762), so far as applicable, which reads:

> "Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The word "petition" in the Tucker Act does not establish that this action is a proceeding in equity; it is, in fact, an action at law.

Law v. *U. S.*, 266 U. S. 494.

The Conformity Act (28 U. S. C. A., Sec. 724) provides:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

Rule 1, of the Common Law Rules of the United States District Court for the Western District of New York provides:

> "Process. A summons substantially in the form prescribed and ordered by the law and practice now or hereafter regulating the Supreme Court of the State of New York shall constitute the proper process in all suits in common law to require the defendant to appear and answer the complaint;"

The foregoing rule of the District Court follows the practice in the courts of the State of New York, and is obviously intended to comply with the Conformity Act. After the service of the summons, in State practice, the defendant having given notice of appearance, the plaintiff serves a complaint stating the facts upon which his claim is based. The analogy between that practice, which obtains in the U. S. District Court for the Western District of New York, and the provisions of the statute forming the basis for this action, is obvious. The Congress authorized an action at law against the United States in the District Court, and specified that, so far as applicable, the Tucker Act should control the procedure. The Tucker Act provides that "in any suit brought" the plaintiff shall

file and serve a petition setting forth a "statement of the facts upon which the claim is based". The Act does not require that the suit be brought by petition, it does not refer to the commencement of the action, but simply calls for the filing and service of a petition "in any suit brought". Is it not a compliance with all of the pertinent statutes to commence such an action as this by summons pursuant to the general practice in the District Court, and file a petition in the action complying with the terms of the Tucker Act? It has been so held.

Mill Creek Navigation & R. R. Co. v. *U. S.*, 246 Fed. 1013, Aff'd 251 U. S. 539;
Bennett Day Importing Co. v. *U. S.*, 8 F. (2d) 83;
Miller v. *U. S.*, 13 Fed. Supp. 684.

It is no answer to the foregoing contention to say that no provision of the New York Civil Practice Act specifies a method for commencing an action against the United States. Congress has authorized suit against the United States, and local practice in the conduct of the suit must be invoked by analogy. Does the New York Practice Act prescribe the method of empanelling a jury, or swearing a witness in an action against the United States?

The Circuit Court, in its opinion herein, declined to follow the cases above cited, and approved several decisions of District Courts holding, more or less directly, to the contrary. The affirmance by this Court of the *Mill Creek* case was held not to be controlling because this Court based its affirmance upon the case of *U. S.* v. *Larkin*, 208 U. S. 333, 28 Sup. Ct. 417, 52 L. Ed. 517, in which the District Court's jurisdiction alone was passed upon and approved. The petitioner asks no more. An attorney for the United States may waive defects and irregularities in procedure not affecting the jurisdiction of the court (*U. S.* v. *Hvoslef*, 237 U. S. 1; *Farrar & Brown* v. *U. S.*, 3 Pet. 459; *U. S.* v. *N. Y. & O. Steamship Co.*, 216 Fed. 61;

Everett Rwy. Co. v. *U. S.*, 236 Fed. 806). This the Circuit Court conceded in the latter portion of its opinion, in which the finding that the District Attorney in this case lacked authority to waive the statute of limitations was based squarely upon the argument that the time limitations was a condition upon the Court's jurisdiction. The ultimate conclusion of the Circuit Court was that the District Court lacked jurisdiction, a conclusion contrary to the decision of this Court in the *Mill Creek* case.

II.

The authority of United States attorneys to act for the United States should be determined by this Court.

The finding of the Circuit Court that respondent had not waived and was not estopped from asserting as a defense the irregularity in petitioner's procedure was based solely upon the jurisdictional character of the time limitation upon suit. Every element of implied waiver and equitable estoppel is to be found in the conduct of the case by the attorneys for the respondent, but the Court held that judicial officers of the United States have no authority, express or implied, to waive the defense or abrogate it by estoppel. This, although petitioner's attorney was misled by assurances made by an Assistant District Attorney *before the defense came into existence.* It would seem that a distinction might properly be drawn between conduct on the part of counsel which induces the opposition to believe that an existing defense will not be raised, and conduct which induces a litigant so to act as to create a defense to his cause of action.

The Court's attention is respectfully directed to the fact that the Circuit Court's ruling is made up of two conclusions; first, that under the Tucker Act suits of this nature must be brought by the service of a petition, a requirement not fulfilled by petitioner until after his time to sue had been exhausted, and second, that respondent's

attorney could not waive the time limitation. It does not appear from the opinion that the court below considered the effect of the District Attorney's admissions and representations upon the requirement that suit be begun by petition. Certainly the provisions of the Tucker Act are not in their nature jurisdictional; in fact, the Congress has expressly referred to them as procedural (Sec. 19 World War Veterans' Act, 38 U. S. C. A., Sec. 445). Petitioner's original process was timely served, but his choice of process was erroneous. Was not that defect cured by respondent's appearance? A procedural error should not be made fatal to petitioner's case simply because the bar of the statute of limitations fell before respondent's formal appearance in the action. If there is any reason to hold that defects in process may ever be waived, the compelling force thereof is immeasurably increased when insistence upon the technicality will work a forfeiture. If the respondent had moved to quash petitioner's summons, a new action could have been brought. The effect of the decision below is to place a tremendous premium on respondent's laches.

Conclusion.

It is respectfully submitted that the questions of law presented herein are of great importance not only because of the sums of money involved in this and similar actions, but also because of the frequency with which these questions have arisen and will in the future arise. The entrance of the Government into business pursuits necessitates a review of those sovereign immunities which can create, and in this instance have created, an inequality of rights between contracting parties.

GEORGE CLINTON, JR.,
Counsel for Petitioner.

ALGER A. WILLIAMS,
Attorney for Petitioner.
CHARLES H. KENDALL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

GEORGE CLINTON, JR.,
ALGER A. WILLIAMS,
Counsel for Petitioner.

CHARLES H. KENDALL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions.

The opinion of Hon. Harlan W. Rippey, District Judge, accompanying his denial of the respondent's motion before trial for a dismissal of the complaint, is reported in 10 Fed. Supp. at page 412, and appears in the record at page 19.

No opinion was handed down by the Hon. John Knight, District Judge, before whom the cause was tried.

The opinion of the Circuit Court of Appeals, Judge Swan writing, Judges L. Hand and A. Hand, concurring, in con-

nection with the reversal of the District Court's judgment for petitioner, is reported in 89 F. (2d) at page 614 and appears at page 29 of the record.

Jurisdiction.

The case is before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted October 11, 1937.

Facts.

This is an action upon a policy of war risk insurance under which the petitioner claims indemnity for total and permanent disability. The judgment of the United States District Court for the Western District of New York, in favor of petitioner (R. 22), has been reversed by the United States Circuit Court of Appeals for the Second Circuit (R. 34), upon the ground that this action was not brought within the time limited therefor by Act of Congress (R. 29-33).

It is not disputed that this action should have been commenced on or before July 1, 1933. On March 16, 1933, petitioner caused a summons to be issued by the Clerk of the District Court at Buffalo, which summons was entitled in this action and, on the same day, was served upon the United States Attorney at Buffalo and the United States Attorney General, Department of Justice, Washington, D. C. (R. 4, 5). This practice was adopted upon the specific instructions of an Assistant United States Attorney at Buffalo (R. 14). Thereafter the respondent failed to appear in the action and, upon inquiry, counsel for the petitioner was assured that due service of the complaint would be admitted by the respondent (R. 15). The complaint herein was served July 26, 1933, and an admission of due service was endorsed thereon by the United States Attorney at Buffalo (R. 7). Thereafter, a copy of the complaint was

mailed to the United States Attorney General at Washington (R. 11, 16).

On February 16, 1934, respondent served an answer denying the allegations of petitioner's complaint, and setting up no affirmative defenses (R. 7). On November 16, 1934, respondent moved to dismiss the complaint upon the ground that the action was barred by the Statute of Limitations (R. 8). The motion was denied by the Hon. Harlan W. Rippey, one of the Judges of the United States District Court for the Western District of New York (Opinion, R. 19, Order, R. 21). The action was brought to trial before the Hon. John Knight, Judge of the District Court, and a jury, on April 9, 1936 (R. 13). Respondent's motions upon the trial for dismissal of the complaint upon the ground that suit was not commenced within the time limited therefor were denied (R. 19), and a judgment in favor of the petitioner, based upon the verdict of the jury, was entered July 17, 1936 (R. 22).

The respondent appealed from the judgment of the District Court to the Circuit Court of Appeals for the Second Circuit, and, on April 19, 1937, the Court of Appeals reversed the judgment below (R. 34), holding that the action was not timely brought and that the delay was not waived by the respondent (R. 29-33). Certiorari was granted by this Court on October 11, 1937 (R. 35).

Questions Presented.

1. Whether an action against the United States upon a policy of war risk insurance can be commenced in the United States District Court for the Western District of New York by the service of a summons.

2. Whether the irregularities in petitioner's procedure or his delay in bringing suit have been waived by the respondent.

ARGUMENT.

Summary.

In issuing to the petitioner the policy of insurance upon which this action was based, the United States acted not in a sovereign governmental capacity, but as a business corporation, creating ordinary contractual rights and liabilities.

The Congress, in authorizing suits upon war risk policies, did not attempt to prescribe every procedural incident in connection therewith, or intend to supplant local practice in those matters not specifically controlled by the statute.

The Tucker Act, which includes every Congressional direction as to procedure in such a case as this, does not specify how such an action shall be commenced, and by necessary inference leaves that and other procedural details to be determined either by the rules of the court of original jurisdiction or the practice of the State in which the action is brought, both of which sources of authority approve the method adopted by petitioner.

The service of the summons in an attempt to commence this action was, at most, a procedural defect which could be, and was, waived by the attorney for the respondent.

The doctrine of sovereign immunity should not be so applied as to deprive petitioner of substantial rights under his contract with the respondent.

Point I.

This is an Action at Law Between Contracting Parties.

The attention of the Court is respectfully directed first to the following excerpt from its opinion, written by Justice Brandeis, in the case of *Lynch* v. *United States*, 292 U. S. 571:

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation, allowances, hos-

pital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. * * * On the other hand, War Risk policies being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. * * * But while the statutes granting gratuities contain no specific provision for suits against the United States, Congress, as if to emphasize the contractual obligation assumed by the United States when issuing War Risk policies, conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private corporations."

The Act by which Congress authorized suit against the United States on War Risk claims is 38 U. S. C. A., Sec. 445 (World War Veterans' Act), and reads, in part, as follows:

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,

and section 765 of Title 28 so far as applicable. * * *

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date. * * * Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. * * *

"If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new cause, if one lies, may be brought within a year though the period of limitations has elapsed."

The right to entertain this action, so granted by Congress to the District Courts, has been concisely described by this Court in these words:

"The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the Court in actions at law for money compensation."

Law v. *United States*, 266 U. S. 494.

This concept of the instant case as an action at law to enforce a promise based upon a valuable consideration, is extremely important to the determination of both the questions before the Court.

Point II.

The Action Was Commenced by Service of the Summons.

The procedural guide prescribed by the Congress is found in the Tucker Act, the pertinent portion of which (28 U. S. C. A., Sec. 762), reads as follows:

"Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The Conformity Act (28 U. S. C. A., Sec. 724) provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The New York Civil Practice Act (Sec. 218) provides:

"A civil action is commenced by the service of a summons, * * *."

The Common Law Rules of the United States District Court for the Western District of New York (Rule 1) provide:

"Process.—A summons substantially in the form prescribed and ordered by the law and practice now or hereafter regulating the Supreme Court of the State of New York shall constitute the proper process in all suits in common law to require the defendant to appear and answer the complaint."

The petitioner respectfully submits that the quoted provisions are entirely consistent. In fact, it is difficult to

see how a petition may be served "in any suit brought" if such suit is not brought until the petition has been served. Certainly if Congress intended to prescribe a method for the commencement of suit in the above excerpt from the Tucker Act, its choice of phraseology was unfortunate, if not inadequate.

Nevertheless, it has been the contention of the respondent that the Tucker Act expresses a complete and exclusive method of prosecuting an action against the United States. If the wording of Section 762 is not in itself a sufficient refutation of that contention, reference may be had to Section 761, which, while not mentioned in the World War Veterans' Act, was enacted at the same time as Section 762 and indicates the intent of the legislature:

> "Proceedings in suits against United States. The course of procedure for the district courts * * * in so far as applicable and not inconsistent with Sections 762 to 765 * * * shall be in accordance with the established rules of said respective courts, * * *."

Further, the Veterans' Act itself modifies its reference to the Tucker Act by the word "so far as applicable". Reference to local practice must be had to determine the innumerable procedural questions which arise in the prosecution of a law suit. It cannot, then, be said that the Conformity Act has no application to actions against the United States. Quite on the contrary, practice in such actions is controlled by the Conformity Act, *i. e.*, the rules of the District Courts adopted pursuant to the Act, except in those particulars as to which the Congress has made inconsistent provision.

In an action at law in any jurisdiction of the United States, the plaintiff must convey to his adversary, by "complaint" or "petition" or other means, the gravamen of his acts, couched in phrases and reciting details which vary

in formality and prolixity with the particular jurisdiction involved. At some time thereafter it becomes the duty of the defendant to give notice of his defense, if any, to the claimant. The Tucker Act provides that in a suit against the United States, a verified petition setting forth the full name and residence of the plaintiff, the nature of his claim, the amount of his demand and a succinct statement of facts shall be filed with the clerk of court (Sec. 762) and served upon the District Attorney and the Attorney General, after which the District Attorney shall have sixty days to file the Government's plea, answer or demurrer (Sec. 763).

It is submitted that the Tucker Act determines the form and substance of the complaint to be served in such an action as this, the persons upon whom it shall be served and with whom filed, the time within which an answer shall be filed and sets certain limits upon default judgments. (Section 765 deals with appeals from judgments against the United States.) No more can be gleaned from the Act except by "interpretation" and "construction", processes appropriate enough when applied to a statutory scheme intended to be comprehensive, but utterly out of place when the legislation involved takes the form of exceptions to a general rule.

The Tucker Act, then, does not prescribe how an action against the United States shall be commenced, and it follows that the instant action was brought when petitioner served the summons herein, in accord with New York practice and the rules of the District Court.

It is no answer to this contention to say that the New York Civil Practice Act does not specify how an action against the United States shall be commenced. The Civil Practice Act, like other codes of procedure, classifies civil actions as "at law" and "in equity", and not by the per-

son of the defendant. The District Courts are not rendered helpless by the fact that Congress did not say how juries should be empanelled, witnesses sworn, judgments entered in suits against the United States. Local practice is, of course, invoked by analogy.

The case of *Mill Creek Navigation and Railroad Company* v. *United States*, 246 Fed. 1013, affirmed 251 U. S. 539, 64 L. Ed. 404, which originated in the Eastern District of Pennsylvania, involved a claim for refund of taxes illegally collected. The practice in the action was controlled by the Tucker Act. A summons was served in accord with local practice, and shortly thereafter a petition conforming to the requirements of the Tucker Act was served and filed. In the interim, however, the statute of limitations ran against the claim, and one of the questions before this Court was presented. Judge Dickinson in a closely reasoned opinion, came to the conclusion that the action was brought when the summons was served, finding that the provisions of the Tucker Act were consistent with the usual practice of the District Court. The affirmance of that decision by this Court will be considered below. It is sufficient at this point to note that jurisdiction of both subject matter and parties was acquired in the *Mill Creek* case in the same manner adopted by petitioner in the instant case.

A like conclusion was reached in *Bennett Bay Importing Company* v. *United States*, 8 F. (2d) 83, (S. D. N. Y.), *Miller* v. *United States*, 13 Fed. Supp. 684 (W. D. N. Y.) and in *Provident Trust Company* v. *United States*, 17 Fed. Supp. 849 (E. D. Pa.).

Point III.

Respondent Waived the Defense of the Statute of Limitations.

On the entire issue of waiver in this case, reference is intended to the following circumstances:

(a) Petitioner's summons was served some three months before the statute of limitations ran against his claim.

(b) The respondent did not move against the summons herein during the period within which a new action might have been brought by the petitioner, nor until more than a year after service of the complaint.

(c) Petitioner's attorney was orally assured by a judicial officer of the respondent that the practice adopted by petitioner was proper and sufficient to give the District Court jurisdiction.

(d) The respondent, by its attorney, admitted due service of the complaint.

(e) Respondent's answer, served more than six months after the complaint, and almost a year after the summons, consisted solely of a general denial of the allegations of petitioner's complaint.

It has not been disputed by respondent that the statute of limitations is, in general, a defense to be affirmatively pleaded in actions at law. That general rule has been recognized by this Court (*Burnet* v. *Desmornes,* 226 U. S. 145). Respondent maintains, however, that the general rule does not apply when the United States is sued.

The distinction sought by respondent seems to be based upon the theory that the expiration of the time within which suit might be brought operated to destroy the petitioner's substantive rights, or upon the theory that the District Court's jurisdiction over the subject matter of this suit lapsed when the bar of the statute fell, or upon the theory that judicial officers of a sovereign government lack authority to waive a defense belonging to the government. It is submitted that no other justification for the distinction can be postulated.

A time limitation upon suit, ordinarily a remedial provision, may be made an element of substantive right if the statute which creates the right conditions it upon timely enforcement (*Central Vermont Railway* v. *White,* 238 U. S. 507, 59 L. Ed. 1433; *Atlantic Coast Line Railway* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226), but this petitioner's claim is based upon a contract distinct from and in nowise dependent upon Section 19 of the World War Veterans' Act (38 U. S. C. A., Sec. 445, *supra*). The statute granted a remedy to petitioner, it did not create his rights.

> "The difference between withdrawing the remedy of court enforcement of a claim against the United States and destroying the whole foundation to the claim is clearly recognized in *Lynch* v. *United States,* 292 U. S. 571, 78 L. Ed. 1434, and *Perry* v. *United States,* 294 U. S. 330, 79 L. Ed. 912."
>
> *Jenkins* v. *United States,* 86 F. (2d) 123 (C. C. A. 5th).

The Circuit Court of Appeals, in its opinion below, reached the conclusion that the time limitation here involved is a condition upon the jurisdiction of the District Court. That finding is at variance with highly persuasive authority.

> "In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the Court. We do not so regard it."
>
> *Ayers* v. *Watson,* 113 U. S. 594.

> "It is urged that the words of both statutes (setting time limitations upon suit) are jurisdictional and constitute a condition precedent. * * * Whether prescription goes only to the remedy or extinguishes the right,

it affects the jurisdiction no more than any other defense."

Burnet v. *Desmornes*, 226 U. S. 145, 57 L. Ed. 159.

In *United States* v. *Ellison*, 74 F. (2d) 864, certiorari denied 295 U. S. 750, it was held that the objection that suit was not timely instituted could not be raised by the Government for the first time on appeal. Obviously the case is distinguished from the one at bar, for here the Government did raise the question in the court below. But if the statute of limitations operates to deprive the court of jurisdiction of the subject matter, no period of acquiescence could cure the defect. No series of appeals, no failure to object, could operate to give the original court jurisdiction of the subject matter if such jurisdiction was originally lacking.

Further consideration of the *Mill Creek* case is important in this connection. The appeal from the District Court to this Court in that case presented squarely the issue of the lower court's jurisdiction. Such a review is directed to "initial questions of the jurisdiction of a United States District or Circuit court, whether in law or equity, over the subject matter and parties" (Taft, J., in *United States* v. *Swan*, 65 Fed. 647, 13 C. C. A. 77). The affirmance of the lower court's decision was therefore directly contrary to the Court of Appeal's conclusion in the instant case, in so far as that conclusion was based upon the lack of jurisdiction of the District Court.

> "By jurisdiction over the subject matter is meant the nature of the cause or action and the relief sought; and this is conferred by the sovereign authority which organized the Court, and it is to be sought for in the general nature of its powers, or in authority specially conferred."
>
> *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Authority on the part of the United States District Attorney to waive the defense of the statute of limitations was

denied by the court below upon the ground that the statute conditioned the court's jurisdiction, and it might logically be assumed that if the time limitation is not, in truth, jurisdictional, a different conclusion should be reached. The doctrine of waiver has been thought to be applicable against the United States.

Farrar & Brown v. *United States,* 3 Pet. 459, 7 L. Ed. 741;
United States v. *New York & Ohio Steamship Co.,* 216 Fed. 61 (C. C. A. 2d);
United States v. *Hvoslef,* 237 U. S. 1;
Thames & Mersey Ins. Co. v. *United States,* 237 U. S. 19;
Everett Railway Co. v. *United States,* 236 Fed. 806.

Point IV.

The Defect in Petitioner's Initial Process, if Any, Was Waived by Respondent.

The summons in this case was issued by the District Court and served upon the District Attorney and the Attorney General before the time limitation upon suit had expired. It does not appear, from its opinion, that the court below attached any signification to that circumstance. The petitioner respectfully urges that his *bona fide* attempt to commence his action in good time distinguishes this case from the authorities upon which the Court of Appeals relied.

The provisions of the Tucker Act are purely procedural in nature; the Congress so described them in the World War Veterans' Act (38 U. S. C. A., Sec. 445, *supra*). If petitioner failed to satisfy the requirements of the Tucker Act, there existed a defect in process to which respondent was entitled to take appropriate objection. The cases of *Cassarello* v. *United States,* 265 Fed. 326, *National Casket Co.* v. *United States,* 263 Fed. 246, *Reid Wrecking Co.* v. *United States,* 202 Fed. 314, and *Whalen Paper & Pulp Mill,*

Ltd. v. *Davis,* 288 Fed. 438, go no further than to hold that such an objection would be well taken.

In the instant case, however, counsel for the respondent did not move against petitioner's summons, but accepted the petition, appeared generally and pleaded to the merits of the cause.

> "The decisions of this Court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine."
>
> *Farrar & Brown* v. *United States,* 3 Pet. 459, 7 L. Ed. 741.

The contention that respondent's appearance cured the defect in petitioner's procedure has been opposed by counsel for the Government upon the ground that such a finding would render the statute of limitations ineffectual. That objection is superficially so meritorious and actually so fallacious as to require special examination.

It has been the avowed intention of Legislatures and Courts alike to avoid the forfeiture of substantial rights by reason of mistakes and irregularities in judicial proceedings.

> "We are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."
>
> *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226.

Born of that intention has been the principle that failure seasonably to object to a procedural defect waives the objection. Frequently it has been provided that even a prompt and vigorous objection will not accomplish destruction of the cause of action. In the World War Veterans' Act the Congress provided that "if suit is seasonably begun but fails for defect in procedure or for other reasons

not affecting the merits, a new cause, if one lies, may be brought within a year though the period of limitation has elapsed." It has not heretofore been thought that a litigant might strengthen his position by failing to urge it. Laches does not ordinarily cause an irregularity in procedure to ripen into a jurisdictional defect. Yet that is precisely the effect respondent contends should be given its failure to quash petitioner's summons.

If respondent had moved against the original process herein and that motion had ultimately been successful, petitioner might have brought a new action either before the limitation expired or within a year after the dismissal (*Johnson* v. *United States,* 68 F. (2d) 588 (C. C. A. 9th); *Miller* v. *United States,* 13 Fed. Supp. 684 (W. D. N. Y.); 38 U. S. C. A., Sec. 445, *supra*). But respondent did not move against the summons; it allowed the matter to rest until the statute of limitations had run, and then claimed a jurisdictional defect. If there is any reason to hold that defects in process may ever be waived, the compelling force thereof is immeasurably increased when insistence upon the technicality would work a forfeiture.

> "The defendant should not be permitted to waive process and all irregularities, and, after the lapse of time sufficient probably to bar the action, avail himself of the defects in, or want of process or service."
>
> *Bentley* v. *Reid,* 133 Fed. 698 (C. C. A. 5th).

Here again the *Mill Creek* case is of importance. In its *per curiam* affirmance this Court cited *United States* v. *Larkin,* 208 U. S. 333, 52 L. Ed. 517, in which it had been held that commencing a District Court proceeding in the wrong district did not affect the jurisdiction of the Court. It has already been noted that this Court may have intended to approve the service of a summons as a method of commencing suit under the Tucker Act, or that the affirm-

ance may have meant that the bar of the statute of limitations did not destroy the District Court's jurisdiction. The only remaining interpretation of the result obtained in the *Mill Creek* case is that this Court thought the service of a summons in the action to be a defect in procedure comparable to an improper venue. It has repeatedly been held that the latter defect may be waived by counsel for the United States (*United States* v. *Hvoslef*, 237 U. S. 1; *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19; *United States* v. *New York & Ohio Steamship Co.*, 216 Fed. 61; *Everett Railway Co.* v. *United States*, 236 Fed. 806). It is submitted, therefore, that the *Mill Creek* case is authority directly supporting the petitioner.

Practical considerations exist which may move the Court to deny that a judicial officer of the United States has power to revive an action against the Government after the statute of limitations has barred the suit. The number of claims, justifiable and otherwise, which have been and are being made against the Government, is one such consideration; the number of judicial officers of the Government is another. It is submitted that every denial of the authority in question has been based upon such practical considerations, and that when justice is served rather than thwarted by the grant of the power, it should be found to exist. Wherever, as here, an attempt in good faith to begin suit has been made before the expiration of the time granted therefor, it should be within the authority of the Government's judicial officers to give validity to the procedure adopted.

The respondent, in its brief in opposition to the grant of certiorari herein, quoted the case of *Tucker* v. *Alexander*, 275 U. S. 228, as authority to the effect that power in Government officers to waive the statute of limitations "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not

exist." The reason given for the conclusion arrived at is seen to be a purely practical consideration, and serves to accentuate the fact that the instant case is not one in which an antiquated claim is sought to be revived but, rather, is one in which a live and enforceable claim may be defeated by the interposition of procedural technicalities.

The case of *Tucker* v. *Alexander*, however, serves to do more than demonstrate a *ratio decidendi*. In it this Court held that Government agents may waive a claimant's failure to comply with statutory requirements, and the sentence of the opinion which was quoted in part by the respondent as above noted, expresses the distinction for which petitioner contends between the instant case and the authorities urged as controlling:

> "Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—*consequences which do not attach to the waiver here.*"

POINT V.

The Respondent is Estopped to Deny That the Action Was Commenced by Service of the Summons.

A textbook could not more accurately define the element of equitable estoppel than does a recitation of the circumstances surrounding the commencement of this action (R. 13-16). Before the time to begin suit had expired, the attorney for the petitioner asked an Assistant United States Attorney at Buffalo how to bring an action against the United States to recover upon petitioner's War Risk policy. The Assistant District Attorney, of course, would have been justified in declining to advise petitioner's attorney. He did not do so. Knowing that petitioner would rely upon his advice, and intending that result, the Government's representative said that this action would prop-

erly be commenced by the service of a summons, in accord with the usual local practice. The petitioner did in fact rely upon that advice, and upon subsequent assurances of regularity, to his prejudice.

Much can be said of the sovereign's absolute immunity from suit, of the necessity that citizens "turn square corners when they deal with the Government" (*Rock Island R. R. Co.* v. *United States,* 254 U. S. 141, 143); but surely it was not the intent of the Congress that a claimant should be actively misled as to the requirements conditioning suit, and then denied relief for failure to perform the true conditions. It is an unusual type of agency which grants to the principal every advantage secured by the agent, in whatever manner secured, but denies the authority of the agent to bind the principal in any respect whatsoever.

> "A party may not, even innocently, mislead an opponent and then claim the benefit of his deception. A person may not rely upon a condition imposed for his benefit when failure to perform the condition is due to his own act."
>
> *Romano* v. *Metropolitan Life Ins. Co.,* 271 N. Y. 288.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated, with costs.

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APPENDIX.

28 U. S. C. A., Secs. 762, 763, 765 (The Tucker Act).

762. Petition in suit against United States.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

763. Same; service; appearance by district attorney.—The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

765. Judgment adverse to Government in suit against United States; appeal.—When the findings of fact and the law applicable thereto have been filed in any case as provided in section 763 of this title, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 31–34) in denying the Government's motion to dismiss the complaint for lack of jurisdiction, is reported in 10 Fed. Supp. 412. The opinion of the Circuit Court of Appeals (R. 48–52) is reported in 89 F. (2d) 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1937 (R. 53). The petition for writ of certiorari was filed July 15, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit on a contract of war risk term insurance was "brought" in time under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, in the absence of compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within the statutory period of limitations for bringing such suits.

2. Whether the United States has waived the defense that the instant suit was not filed in time.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra,* pp. 14–16.

STATEMENT

This is an action by the petitioner, Leo N. Munro, in the District Court of the United States for the Western District of New York, upon a contract of war risk term insurance (R. 8–11). It is conceded in the petition for writ of certiorari (p. 2) that this action was barred by the limitations provision of Section 19 of the World War Veterans' Act, 1924, as amended, *infra,* p. 14 unless "brought" on or before July 1, 1933.

On March 16, 1933, petitioner filed a praecipe for the issuance of a summons in the office of the Clerk of the District Court. On the same day, a summons was issued, pursuant to the praecipe, a copy of the summons was served upon the United States Attorney at Buffalo, New York, and an-

other copy sent by registered mail to the Attorney General in Washington, D. C. (R. 1, 3, 5–8, 17). On July 26, 1933, a copy of the complaint (R. 8–11) was served for the first time on the United States Attorney (R. 1, 12, 17, 25),[1] in which petitioner sought to recover monthly benefits under a contract of war risk term insurance on account of total and permanent disability alleged to have existed at the time of his discharge from the military service on June 25, 1919 (R. 10). The complaint itself, however, was not filed in court until April 23, 1936, after the trial (R. 4). On February 15, 1934, the United States Attorney filed an answer to the merits on behalf of the Government (R. 3, 12), and, on or about November 16, 1934, moved to dismiss the complaint for want of jurisdiction, upon the ground that suit upon the claim was barred under Section 19 of the World War Veterans' Act, 1924, as amended (R. 13–15), the complaint or petition not having been filed in the District Court and served upon the United States Attorney until after July 1, 1933.

Petitioner's attorney thereupon filed an affidavit to the effect, in part, that the procedure followed by him in attempting to bring suit had been approved by an Assistant United States Attorney,

[1] The Circuit Court of Appeals states in its opinion that it does not appear that a copy of the complaint or petition was ever sent to the Attorney General, by registered mail, as required by Section 6 of the Tucker Act, *infra*, p. 15 (R. 50).

who had assured him that it would be sufficient to give the District Court jurisdiction (R. 16–20).

On April 11, 1935, the Government's motion to dismiss was denied by District Judge Rippey (R. 34–35), who delivered an opinion holding that, under the Conformity Act, *infra*, p. 16, the issuance by the Clerk of the summons and its service according to State practice constituted the bringing of suit within the meaning of Section 19 of the World War Veterans' Act, 1924, as amended; that, in any event, the question whether the suit was brought within the time limitation prescribed by Section 19 constituted an affirmative defense; that the provisions for bringing the Government into court contained in the Tucker Act [2] were procedural and not jurisdictional, and that in consequence the defense of limitations, together with any procedural defects upon which such defense might be based, were waived by the Government's general appearance and answer to the merits (R. 31–34).

The case was tried before District Judge Knight and a jury on April 9, 1936 (R. 4). The evidence included testimony by petitioner's attorney which was substantially to the same effect as his affidavit previously filed in opposition to the motion to dismiss for lack of jurisdiction (R. 21–30). At the

[2] Under Section 19 of the World War Veterans' Act, *infra*, p. 14, Sections 5 and 6 of the Tucker Act, *infra*, pp. 15–16 are expressly made applicable to suits upon contracts of war risk insurance.

close of petitioner's case, the Government again moved to dismiss the action on the ground that suit had not been commenced in time, and the motion was denied (R. 30). The motion was renewed at the conclusion of the entire case and was again denied, exception being noted to this ruling (R. 31). A verdict was rendered for petitioner, and judgment was entered thereon July 29, 1936 (R. 4, 35). An appeal was taken September 3, 1936 (R. 38–39), assigning error separately to the several denials of the motions to dismiss (R. 40–41). All of the proceedings pertinent to these motions were incorporated in a timely bill of exceptions (R. 13–31, 42–45).

The Circuit Court of Appeals for the Second Circuit unanimously reversed the judgment of the District Court, for the reasons, as stated in its opinion (R. 48–52), that the provisions of Sections 5 and 6 of the Tucker Act, requiring that a petition "shall" be filed and a copy thereof be served upon the United States Attorney and mailed to the Attorney General,[3] are mandatory and exclusive of State practice under the Conformity Act in suits like the present one; that such a suit could not be deemed to have been brought at least until a copy of the petition had been served upon the United States Attorney; that the suit was barred because neither this nor any of the other requirements of

[3] The opinion omitted any reference to the fourth requirement that an affidavit of service be filed with the clerk.

the Tucker Act were complied with until after the expiration of the time limitation prescribed by Section 19 of the World War Veterans' Act, 1924, as amended; and that petitioner's failure to bring his suit in time was not waived by the assurance of the Assistant United States Attorney that service of summons would toll the statute of limitations, or by the filing of an answer to the merits, since the time limitation is a condition of the court's jurisdiction over the subject matter of the action, and cannot be waived. Decisions relating to waiver of matters of venue were held to be not in point.

ARGUMENT

I

The decision of the Circuit Court of Appeals to the effect that at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period contained in Section 19 of the World War Veterans' Act of 1924, as amended, finds ample support in the decisions which announce the rule that, when the United States consents to be sued, the conditions of such consent must be strictly complied with (*Schillinger* v. *United States,* 155 U. S. 163, 166; *United States* v. *Michel,* 282 U. S. 656, 659; *Tyson* v. *United States,* 76 F. (2d) 533, 535 (C. C. A. 4th), affirmed, 297 U. S. 121); that this rule applies to the pro-

cedure to be followed (*Reid* v. *United States,* 211 U. S. 529, 538; *Rock Island &c. R. R. Co.* v. *United States,* 254 U. S. 141, 143; *Reid Wrecking Co.* v. *United States,* 202 Fed. 314 (N. D. Ohio); *Walton* v. *United States,* 73 F. (2d) 15, 17 (C. C. A. 8th)); and that where, as here, Congress has legislated with respect to the subject, the Conformity Act, *infra,* has no application (*Southern Pacific Company* v. *Denton,* 146 U. S. 202, 209).

Moreover, the decision of the Circuit Court of Appeals would seem to be supported by the plain language of Sections 5 and 6 of the Tucker Act, expressly made applicable to suits on contracts of war risk insurance by Section 19 of the World War Veterans' Act, 1924, as amended. Construing these provisions together, they specifically provide that in any suit upon a contract of war risk insurance the plaintiff "shall" file a petition, serve a copy thereof upon the United States Attorney, and mail a copy to the Attorney General.

The historical background of the provisions also gives support to the conclusion that they can have significance only under the construction that the conditions set forth therein were meant to be conditions precedent to the commencement of the action. Under the common law both in England and in this country, actions were commenced by the issuance of a writ with a bona fide intention to

make service thereof (Angell on Limitations, 6th Edition, Sections 311, 312, 318). It was always essential, however, that ultimately a complaint or declaration be filed, and a copy thereof served upon the defendant. While, in many States, this procedure had been altered by statute at the time of the passage of the Tucker Act (1887) (Wood on Limitations, 1st Edition, 1883, and 2nd Edition, 1893, Sec. 290), no jurisdiction had dispensed with the requirements that, at some stage during the proceeding, a petition be filed and served. It follows that, had adoption of local practice under provisions of the Conformity Act, *infra*, p. 16, been contemplated for suits brought under the Tucker Act, the provisions of the latter requiring the filing and service of a petition would have been wholly superfluous.

A Congressional intent to require the filing and service of a petition as essential for commencement of suit was amply supported by precedent. An identical change in equity procedure had been made in England in 1705 (4 Anne, c. 16, Sec. 22) and carried forward in this country (*United States* v. *American Lumber Co.*, 80 Fed. 309, as affirmed, 85 Fed. 827 (C. C. A. 9th)). Moreover, when the Tucker Act was passed, several of our own States had extended to all civil actions the requirement that a complaint be filed prior to issu-

ance of the summons. (Wood on Limitations, 1st and 2nd Editions, Sec. 290, *supra.*)

Furthermore, as to suits against the United States, the desirability of a uniform procedure and a procedure requiring initial disclosure of the nature of the action, is readily apparent. Different from a private litigant, usually subject to suit only in his own locality and on causes of action probably known to him in advance, the Government, by the Tucker Act, made itself subject to suit in any district on causes of action which, in all probability, were not known in advance to either the United States Attorney or the Attorney General. As proper defense of a suit must be predicated upon early knowledge of the nature thereof, a Congressional intent to permit commencement of a suit only by filing and serving a petition is clearly consistent with the practical situation created. Also, the view that the Tucker Act is exclusive, providing for one uniform method of commencing suits against the Government, may be deemed consistent with an intention to avoid uncertainty and confusion inherent in the adoption of the local practice of each of the several States. At the time of the passage of the Tucker Act (Wood on Limitations, 1st and 2nd Editions, Sec. 290, *supra*), as at the present time, State practice varied from the provision that suit is commenced

merely upon issuance of the writ to the requirement that a complaint be filed and served.

As is pointed out by the Circuit Court of Appeals in its opinion (R. 51), its decision is supported either directly or by clear inference by two decisions of other Circuit Courts of Appeals and by eight District Court decisions. While three District Court decisions were cited by the Circuit Court of Appeals as supporting a contrary conclusion (*Miller* v. *United States,* 13 F. Supp. 684 (W. D. N. Y.); *Bennett Day Importing Co.* v. *United States,* 8 F. (2d) 83 (S. D. N. Y.); *Mill Creek & M. N. & R. Co.* v. *United States,* 246 Fed. 1013 (E. D. Pa.), affirmed per curiam, 251 U. S. 539), they, of course afford no basis for the issuance of a writ of certiorari. It may be pointed out that two of these decisions were rendered by District Courts in the Second Circuit (*Bennett Day Importing Co.* and *Miller cases*), and were therefore overruled by the decision of the Circuit Court of Appeals for that Circuit in the present case. Moreover, one of these two decisions (*Miller case*) was rendered by the same District Judge who denied the Government's first motion to dismiss in the present case.

Indeed, the only case cited by the petitioner as establishing a conflict of decisions is the per curiam affirmance by this Court (251 U. S. 539) of the District Court decision in the *Mill Creek case, supra.* That per curiam affirmance has never been deemed by any court to constitute a decision of the

question here presented. Although the ten decisions cited by the Circuit Court of Appeals in the instant case in support of its opinion were all decided subsequent to the per curiam affirmance in the *Mill Creek case,* none of them made reference to that case. And although the District Court opinion in the *Mill Creek case* was cited in support of the decision in the *Bennett Day case,* the court did not rely upon the per curiam affirmance by this Court. In the instant case the per curiam affirmance in the *Mill Creek case* was considered by the Circuit Court of Appeals and deemed distinguishable (R. 51–52).

II

The Circuit Court of Appeals was clearly correct in holding that the petitioner's delay in bringing suit was not waived by the statement of an Assistant United States Attorney that service of a summons would toll the statute, or by the filing of an answer of general denial after the copy of the petition had been served upon the United States Attorney. This follows under the rule now well established that the court's jurisdiction over the subject matter in suits upon contracts of war risk insurance is contingent upon the timely commencement of suit (*Lynch* v. *United States,* 80 F. (2d) 418, 419 (C. C. A. 5th), certiorari denied, 298 U. S. 658, rehearing denied, 298 U. S. 692; *United States* v. *Trollinger,* 81 F. (2d) 167, 168–169 (C. C. A. 4th); *United States* v. *Valndza,* 81 F. (2d) 615 (C. C. A. 6th)). In line with the decisions in cases

involving war risk insurance, similar provisions in the Tucker Act for limitation upon suits in the Court of Claims (*Finn* v. *United States,* 123 U. S. 227; *DeArnaud* v. *United States,* 151 U. S. 483, 495–496; *United States* v. *Wardwell,* 172 U. S. 48, 52), and in the District Courts (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1056 (C. C. A. 2d); *Carpenter* v. *United States,* 56 F. (2d) 828 (C. C. A. 2d)), have been held to involve jurisdiction over the subject matter. See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, and *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 201, where similar rulings were made as to like provisions in the Interstate Commerce Act and the Employers' Liability Act, respectively.

That limitation provisions of this nature, because they involve jurisdiction over the subject matter, cannot be waived is apparent from the decision of this Court in *Tucker* v. *Alexander,* 275 U. S. 228, 232, where it was said, in connection with a similar statutory limitation, that waivers thereof by Government officers, if allowed, "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist." See also *Atlantic Coast Line R. R.* v. *Burnette, supra.*

CONCLUSION

The opinion of the court below is clearly sound and there exists no such conflict of decisions as

requires review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1937.

APPENDIX

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended, as contained in Section 445, Title 38, U. S. C., provides:

> *In the event of disagreement as to claim,* including claim for refund of premiums, *under a contract of insurance* between the Veterans' Administration and any person or persons claiming thereunder *an action on the claim may be brought against the United States* either in the Supreme Court of the District of Columbia or *in the district court of the United States* in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. *The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,* and section 765 of Title 28 so far as applicable.[1] * * *
>
> *No suit* on yearly renewable term insurance *shall be allowed under this section unless the same shall have been brought within six years after the right accrued* for which the claim is made *or within one year after July 3, 1930, whichever is the later date,* * * * : *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the con-

[1] Section 765 relates to procedure in the event of a judgment adverse to the Government, and is not pertinent here.

tingency on which the claim is founded: *Provided further,* That *this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim* sued upon *and the denial of said claim* by the Administrator of Veterans' Affairs. * * * [Italics ours.]

Section 5 of the Act of March 3, 1887, commonly known as the Tucker Act, as contained in Section 762, Title 28, U. S. C., provides:

> *The plaintiff* in any suit brought under the provisions of section 41, paragraph 20, of this title *shall file a petition,* duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other things claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. [Italics ours.]

Section 6 of the Tucker Act, as contained in Section 763, Title 28, U. S. C., provides:

> *The plaintiff shall cause a copy of his petition* filed under section 762 of this title, *to be served upon the district attorney* of the United States in the district wherein suit is brought, *and shall mail a copy* of the same *by registered letter, to the Attorney General* of the United States, *and shall* thereupon *cause to be filed* with the clerk of the court wherein suit is instituted *an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney*

upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and *within sixty days after the service of petition upon him,* unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government,* and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. [Italics ours.]

R. S. Sec. 914, commonly known as the Conformity Act, as contained in Section 724, Title 28, U. S. C., provides:

> *Conformity to practice in State courts.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 19–21), in denying the Government's motion to dismiss the complaint for lack of jurisdiction, is reported in 10 F. Supp. 412. The opinion of the Circuit Court of Appeals (R. 29–33) is reported in 89 F. (2d) 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1937. (R. 34.) The petition for writ of certiorari was filed July 15, 1937, and granted October 11, 1937. (R. 35.) The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit on a contract of war risk term insurance was "brought" in time under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, in the absence of compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within the statutory period of limitations for bringing such suits.

2. Whether the United States has waived the defense that the instant suit was not filed in time.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 28–31.

STATEMENT

This is an action by the petitioner, Leo N. Munro, in the District Court of the United States for the Western District of New York, upon a contract of war risk term insurance. (R. 5–7.) It is conceded in petitioner's brief (p. 2) that this action was barred by the limitations provision of Section 19 of the World War Veterans' Act, 1924, as amended (*infra*, p. 28), unless "brought" on or before July 1, 1933.

On March 16, 1933, petitioner filed a praecipe for the issuance of a summons in the office of the Clerk of the District Court. On the same day, a summons was issued, pursuant to the praecipe, a copy

of the summons was served upon the United States Attorney at Buffalo, New York, and another copy sent by registered mail to the Attorney General in Washington, D. C. (R. 1, 2, 4–5, 6, 14–15). On July 26, 1933, a copy of the complaint was served for the first time on the United States Attorney (R. 5–7, 9, 11). In his complaint petitioner sought to recover monthly benefits under a contract of war risk term insurance on account of total and permanent disability alleged to have existed at the time of his discharge from the military service on June 25, 1919. (R. 5, 6.) The complaint itself, however, was not filed in court until April 23, 1936, after the trial (R. 3), and although counsel for the petitioner stated in an affidavit (R. 11) and testified (R. 16) that a copy of the complaint was mailed to the Attorney General, there is no evidence that this was done by registered mail, as required by Section 6 of the Tucker Act (*infra*, p. 30).[1] There is, furthermore, no evidence of compliance with the fourth requirement in Section 6 that an affidavit of service be filed with the Clerk of the court.

On February 15, 1934, the United States Attorney filed an answer to the merits on behalf of the Government (R. 2, 7–8), and, on or about November 16, 1934, moved to dismiss the complaint for want of jurisdiction, upon the ground that suit

[1] The Circuit Court of Appeals stated in its opinion (R. 31): "Indeed, the requirement that a copy of the petition be mailed to the Attorney General does not appear to have been complied with at any time * * *."

upon the claim was barred under Section 19 of the World War Veterans' Act, 1924, as amended (R. 8–9, 12), the complaint or petition not having been filed in the District Court and served upon the United States Attorney until after July 1, 1933.

Petitioner's attorney thereupon filed an affidavit to the effect, in part, that the procedure followed by him in attempting to bring suit had been approved by an Assistant United States Attorney, who had assured him that it would be sufficient to give the District Court jurisdiction and toll the statute of limitations. (R. 10–12.)

On April 11, 1935, the Government's motion to dismiss was denied by District Judge Rippey (R. 19–22), who delivered an opinion holding that, under the Conformity Act, *infra*, p. 31, the issuance by the Clerk of the summons and its service according to State practice constituted the bringing of suit within the meaning of Section 19 of the World War Veterans' Act, 1924, as amended; that, in any event, the question whether the suit was brought within the time limitation prescribed by Section 19 constituted an affirmative defense; that the provisions for bringing the Government into court contained in the Tucker Act [2] were procedural and not jurisdictional, and that in consequence the defense of limitations, together with any

[2] Under Section 19 of the World War Veterans' Act, *infra*, p. 28, Sections 5 and 6 of the Tucker Act, infra, pp. 29–31, are expressly made applicable to suits upon contracts of war risk insurance.

procedural defects upon which such defense might be based, were waived by the Government's general appearance and answer to the merits (R. 19–21).

The case was tried before District Judge Knight and a jury on April 9, 1936 (R. 3.) The evidence included testimony by petitioner's attorney which was substantially to the same effect as his affidavit previously filed in opposition to the motion to dismiss for lack of jurisdiction (R. 13–17.) At the close of petitioner's case, the Government again moved to dismiss the action on the ground that suit had not been commenced in time, and the motion was denied. The motion was renewed at the conclusion of the entire case and was again denied, exception being noted to this ruling (R. 19.) A verdict was rendered for petitioner, and judgment was entered thereon July 29, 1936 (R. 3, 22–23.) An appeal was taken September 3, 1936 (R. 23–24), assigning error separately to the several denials of the motions to dismiss (R. 24–25). All of the proceedings pertinent to these motions were incorporated in a timely bill of exceptions (R. 8–19, 25–27.)

The Circuit Court of Appeals for the Second Circuit unanimously reversed the judgment of the District Court for the reasons, as stated in its opinion (R. 29–33), that the provisions of Sections 5 and 6 of the Tucker Act, requiring that a petition "shall" be filed and a copy thereof served upon the United States Attorney and mailed to the Attor-

ney General,[3] are mandatory and exclusive of State practice under the Conformity Act in suits like the present one; that such a suit could not be deemed to have been brought at least until a copy of the petition had been served upon the United States Attorney; that the suit was barred because neither this nor any of the other requirements of the Tucker Act were complied with until after the expiration of the time limitation prescribed by Section 19 of the World War Veterans' Act, 1924, as amended; and that petitioner's failure to bring his suit in time was not waived by the assurance of the Assistant United States Attorney that service of summons would toll the statute of limitations, or by the filing of an answer to the merits, since the time limitation is a condition of the court's jurisdiction over the subject matter of the action, and cannot be waived. Decisions relating to waiver of matters of venue were held to be not in point.

SUMMARY OF ARGUMENT

I

Suit was not "brought" by the petitioner within the time permitted by Section 19 of the World War Veterans' Act, 1924, as amended. That section by reference to Sections 5 and 6 of the Tucker Act provides the only procedure for the commencement

[3] The opinion omitted any reference to the fourth requirement that an affidavit of service and mailing be filed with the clerk.

of suit effective to stop the running of the limitation contained therein. Petitioner failed to take any of the steps required by those sections until after the period of limitation for bringing suit had expired, but contends that a service of summons on the United States Attorney during the limitation period constituted the commencement of a suit under the local practice act which, he claims, was applicable by virtue of the Conformity Act, to suits against the Government under the World War Veterans' Act. We submit that this contention is without merit.

(1) Sections 5 and 6 of the Tucker Act provide procedure which is simple and comprehensive in scope and includes steps which are manifestly sufficient to constitute the commencement of an action, effective to toll limitations. It would, therefore, seem reasonable to conclude that Congress intended to provide that such procedure should constitute the commencement of an action. This conclusion is further justified by the fact that the Tucker Act contains both a time limitation and procedure sufficient to toll it. That such procedure was intended to be exclusive is evident from the fact that the provisions for it are mandatory. (2) The provisions in question were obviously intended for the protection of the United States, which would be denied or impaired if procedure other than that provided for could be invoked as a means of commencing an action so as to toll limitations. (3) It is submitted that procedural steps legally effec-

tive for bringing a defendant into court must be taken before the limitation period can be considered to have been tolled, and since the sole means of bringing the United States into court is found in the Tucker Act, the limitation has not been tolled where, as here, none of the provisions of that Act have been complied with in time.

II

The Government has not waived the defense that the suit was not brought in time. Under the rule of strict construction applicable to all statutory waivers of the Government's sovereign immunity from suit, it has been held that the time limitations contained in Section 19 of the World War Veterans' Act, as amended, and other statutes giving consent to sue the Government, being intended for the protection of the Government, are conditions to the jurisdiction of the court and cannot be waived. But whether the limitation in Section 19 goes to the jurisdiction of the court or is an element of substantive right is immaterial since limitations of the latter kind are not subject to waiver.

It is equally clear that the United States Attorney and his assistant had no authority to make the service of summons in the instant case effective to toll the time limitation. The procedural requirements in the Tucker Act like the limitation provisions are provided for the protection of the Government and unless the interests of the Government might be protected or furthered thereby, as

in the waiver of venue, they may not be waived. Certainly to allow waiver of such requirements would be inconsistent with the evident desire of Congress for uniformity of procedure. Moreover, if United States Attorneys were authorized to make service of summons or other void proceedings effective to interrupt the period of limitations, the United States would lose the protection afforded by the provisions of the Tucker Act against the possible nullification of the time limitation in the event the United States Attorney should be derelict in his duty. Even if it were to be assumed that compliance with the requirements which had not already been met, were waived by the filing of the general appearance and answer to the merits on behalf of the Government, such waiver would be ineffective to restore petitioner's privilege of suit which was lost with the expiration of the limitation period.

ARGUMENT

I

SUIT WAS NOT "BROUGHT" BY THE PETITIONER WITHIN THE TIME PERMITTED BY SECTION 19 OF THE WORLD WAR VETERANS' ACT, 1924, AS AMENDED

Section 19 of the World War Veterans' Act, 1924, as amended (*infra*, p. 28), confers the privilege of suit against the United States on a contract of war risk insurance in the event of disagreement between the claimant and the Veterans Administration, but provides that no suit may be al-

lowed unless "brought" within a specified period of time.

It further expressly provides that the procedure in such suits shall be the same as that provided in Sections 5, 6 and 10 of the Tucker Act (*infra*, pp. 29–31), in so far as such procedure may be applicable. Sections 5 and 6 of the Tucker Act provide, specifically, that the plaintiff "shall" (1) file a petition, duly verified, with the Clerk of the court in the district where the plaintiff resides, which shall contain his name and residence, the nature of his claim, and the facts upon which it is based, the damages sought to be recovered, and a prayer for judgment (Section 5); (2) serve a copy of the petition upon the United States Attorney; (3) send a copy to the Attorney General by registered mail; and (4) file with the Clerk an affidavit of such service and mailing; that upon service of a copy of the petition upon the United States Attorney he shall be under the duty "to appear and defend the interests of the government" by a plea, answer, or demurrer within sixty days thereafter, unless the time be extended by order of the court; and that, in default of such defense, the plaintiff may proceed with the case under such rules as the court may adopt, but not have judgment unless he shall establish his claim by proof satisfactory to the court (Section 6). It is significant that the provisions relating to the proceedings required of the plaintiff are expressly mandatory.

Petitioner does not dispute the fact that he failed to meet any of the requirements of Sections 5 and 6 of the Tucker Act until he served a copy of his complaint on the United States Attorney after the period of limitation upon bringing suit had expired. (Pet. Br. pp. 2–3.) Indeed, the complaint itself was not filed until after the verdict (R. 3), and petitioner has not, at any time, met the other requirements that a copy of the petition or complaint be sent by registered mail to the Attorney General and that an affidavit as to the service and mailing be filed with the Clerk of court. He contends, however, that the provisions of the Civil Practice Act of New York for commencing an action merely by service of a summons, were intended by Congress to be applicable by analogy, under the Conformity Act (*infra,* p. 31), to suits against the United States under Section 19 of the World War Veterans' Act, 1924, as amended, and hence, that he "brought" suit in time by the service of the summons on the United States Attorney.

We submit that petitioner's contention is without merit. It is the view of the Government that Section 19 of the World War Veterans' Act, 1924, as amended, by expressly adopting the provisions of Sections 5 and 6 of the Tucker Act, provided the only procedure for the commencement of suit, effective to toll the limitation contained in that section.

1. Sections 5 and 6 of the Tucker Act, which is entitled "An Act to provide for the bringing of

suits against the Government of the United States", provide procedure which is simple and comprehensive in scope and includes steps which are manifestly sufficient to constitute the commencement of an action effective to toll limitations. The procedure provided is not only effective to docket the suit and inform the Government of the cause of action, but also to bring the United States into court and compel it to make defense or suffer judgment by default (if the claim shall be established). It seems reasonable to conclude that by including provisions for procedure sufficient to constitute the commencement of an action among provisions so simple and comprehensive in their nature as those contained in Sections 5 and 6, Congress intended to provide that such procedure should constitute the commencement of an action. Moreover, the Tucker Act includes in itself a limitation upon suits [4] and it would seem reasonable to assume that where an Act contains both a limitation and provision for procedure sufficient to toll the limitation, such procedure was intended to have that effect. That Sections 5 and 6 were intended to provide the exclusive procedure for commencing an action against the United States is evident also

[4] Section 1, paragraph second, of the Tucker Act (24 Stat. 505; U. S. C., Title 28, Sec. 41 (20) provided:

"That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

from the fact that provisions for such procedure are mandatory.[5]

2. The provisions in question were obviously intended for the protection of the United States, which would be denied or impaired if procedure other than that provided for could be invoked as a means of commencing an action so as to toll limitations. In the debate upon the bill which became the Tucker Act, it was stated by Mr. Tucker that protection of the United States against possible neglect or default upon the part of the United States Attorney was the purpose of the provision for the mailing of a copy of the petition to the Attorney General. (Cong. Rec., Vol. 18, Part 1, p. 623.) Clearly this was also the purpose of the requirement that the plaintiff establish his claim by proof satisfactory to the court where no defense has been interposed by the United States. Furthermore, full protection to the United States would be denied if there were substituted for the uniform practice provided in the Tucker Act itself the varying practices in the several states. The numerous individuals and agencies concerned with the consideration and preparation of cases to which the Government might be a party defendant would not ordinarily be familiar with these different prac-

[5] Since petitioner failed to comply in time with any of the provisions of the Act, it is unnecessary to consider which of them must be complied with in order to toll the period of limitations, or whether compliance with all of them is required for that purpose.

tices, with the result that the Government's interests might often be impaired. Moreover, under the practice prevailing in many jurisdictions, insufficient time might be allowed for such consideration and preparation. Cf. *United States* v. *Lindholm*, 79 F. (2d) 784, 787.

Furthermore, if it were permissible to invoke local procedure for the commencement of an action, it would be possible for a negligent United States Attorney to nullify the protection afforded the Government in the limitation provision. Local procedure, ineffective to bring the United States into court, as hereinafter developed (*infra*, pp. 14–18), could nevertheless be relied upon to toll limitations and thus allow a claimant to preserve his claim by invoking such procedure and to prosecute it later when it might better suit his purpose. Such a situation would manifestly be avoidable if the provisions of the Tucker Act should be complied with, since the Attorney General would have notice of the proceedings.

3. It is submitted that procedural steps effective for bringing a defendant into court must be taken before the limitation can be considered to have been tolled, and since the sole means of bringing the United States into court is found in the Tucker Act, the limitation has not been tolled where, as here, none of the provisions of that Act have been complied with in time.

It has been generally held that the statute of limitations is not tolled unless procedural steps

have been taken which are legally effective for bringing the defendant into court. In *United States* v. *American Lumber Co.*, 80 Fed. 309, affirmed, 85 Fed. 827 (C. C. A. 9th), it was held that the statute limiting the time within which suits might be "brought" by the United States to cancel land patents was not complied with by invoking an invalid process even though done in good faith upon the mistaken assumption that the process was valid. The lower court stated, referring to the general rule as to when an action is commenced so as to toll a statute of limitations (p. 316):

> "* * * the action, while it may be deemed 'commenced' or 'brought', so far as the plaintiff is concerned, when the complaint is filed, is not considered 'commenced' or 'brought' *so far as the defendant is concerned,* so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the appropriate process and making a *bona fide* effort to serve the same." [Italics ours.]

And, in the opinion of the Circuit Court of Appeals, it is further said (p. 831):

> It does not aid the *bona fides* of the attempt to serve that the appellant's counsel thought that the subpoenas could be legally served by the persons to whom they were sent. It is immaterial what may have been his belief or his opinion in that regard. The *bona fides* must be shown by proof that

> an effort was made to proceed according to law, and that use was made, or attempted to be made, of the *means which the law prescribes.* [Italics ours.]

See also *Fernekes* v. *Case,* 75 Iowa 152; *Jackson* v. *Brooks,* 14 Wend. (N. Y.) 649, 654; *Dorr's Admr.* v. *Rohr,* 82 Va. 359; *Brock* v. *Francis,* 89 Kans. 463; *Bacigalupo* v. *Superior Court of the City and County of San Francisco,* 108 Cal. 92; *Town of Woodville* v. *Town of Harrison,* 73 Wis. 360; *Jordan* v. *Bosworth,* 123 Ga. 879; *Maddox* v. *Humphries,* 30 Tex. 494; *Bates* v. *J. G. Smith & Bros.,* 80 Tex. 242; *Casey* v. *Newport Rolling Mill Co.,* 156 Ky. 623; *J. Cushing Co.* v. *Brooklyn Trust Co.,* 235 Mass. 171; *Angell on Limitations,* 6th Ed., Section 312; *Wood on Limitations,* 1st Ed., 1883, and 2d Ed., 1893, Section 289.

Furthermore, the Tucker Act provides the only procedure for bringing the United States into court. It is well settled that any conditions attached by Congress to the privilege of suing the United States must be strictly complied with (*Nichols* v. *United States,* 7 Wall. 122, 126; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *United States* v. *Michel,* 282 U. S. 656, 659), and that this rule applies to the procedure to be followed (*McElrath* v. *United States,* 102 U. S. 426; *Reid* v. *United States,* 211 U. S. 329, 538), even as to purely formal matters (*Rock Island R. R.* v. *United States,* 254 U. S. 141, 143). Moreover, the principle is well

established that where Congress has prescribed definite rules governing any matter of procedure or practice in the United States courts, such rules are to that extent exclusive of local rules of practice and procedure relating to the same matter which might otherwise be applicable under the Conformity Act. (*Southern Pacific Company* v. *Denton,* 146 U. S. 202, 209, and cases cited therein; *Mexican Central Railway* v. *Pinkney,* 149 U. S. 194, 206; *United States* v. *Lindholm,* 79 F. (2d) 784, 787.)

In *Reid Wrecking Co.* v. *United States,* 202 Fed. 314, 316 (E. D. Ohio), Mr. Justice Day, while a District Judge, in the course of an opinion granting motions to quash the process on the ground of want of venue, said of Section 6 of the Tucker Act:

> Section 6 of this act describes the manner of service or process which must be followed by plaintiffs in suits against the government in the District Court.

And accordingly it has been held in several decisions that a summons pursuant to local practice (as in the instant case) is ineffective as a means of bringing the United States into court. *National Casket Co.* v. *United States,* 263 Fed. 246 (S. D. N. Y.); *Cassarello* v. *United States,* 265 Fed. 326 (M. D. Pa.); *Miller* v. *United States,* 11 Fed. Supp. 924 (W. D. N. Y.). See also *Whelan Paper and Pulp Mills* v. *Davis,* 53 App. D. C. 84, 288 Fed. 438, 441.

In the absence, therefore, of clear language in the statutory provisions in question here, it could scarcely be presumed that Congress intended that a service of summons or other proceeding not among those specified in Sections 5 and 6 of the Tucker Act, although ineffective as a means of bringing the United States into court, should, nevertheless, constitute the commencement of an action effective to stop the running of the limitation period.

The Government's position that Congress intended the commencement of suit to be governed by Sections 5 and 6 of the Tucker Act is supported by several decisions holding that a suit is not "brought" so as to stop the running of limitations until a copy of the petition has been served upon the United States Attorney. (*Bates Manufacturing Co.* v. *United States* (C. C. A. 1st) decided December 8, 1937, not yet reported; *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th); *Creasy* v. *United States,* 4 F. Supp. 175, 179; *Henry* v. *United States,* 15 F. Supp. 651. See also, *Spencer* v. *United tSates,* 14 F. Supp. 46, 47.) Moreover, in *Bachmann, Emmerich & Co.* v. *United States* (S. D. N. Y.) (decided June 4, 1935, unreported but published in 16 A. F. T. R. 1056 and 353–A. C. C. H., p. 9427), it was held that all of the requirements must be met.

4. Petitioner points to the fact that Section 19 of the World War Veterans' Act (*infra,* p. 28), in adopting the procedure in Sections 5, 6, and 10

of the Tucker Act, contains the qualifying clause "so far as applicable." It is submitted, however, that this clause was evidently intended only to refer to the provisions in Section 10 relating to the findings and opinion of the court, which are obviously inapplicable to war risk insurance cases tried before juries.

The provisions of Section 4 of the Tucker Act, as amended, to which petitioner also refers (Pet. Br. p. 8), afford no support for his contention. They (*infra,* p. 29) provide that "the course of procedure" for the District Courts shall be in accordance with "the established rules of said respective courts", but only "in so far as applicable and not inconsistent with" Sections 5 and 6. The inconsistency between a service of summons as a method of bringing suit and the procedure provided for that purpose in Sections 5 and 6 is apparent. Moreover, the fact that Section 4 was not among those adopted by Section 19 of the World War Veterans' Act indicates that it was not intended to be applicable to suits under the latter section in any event.

As indicating an intention by Congress that procedure in advance of the filing of the petition was contemplated, the petitioner also refers to that portion of Section 5 of the Tucker Act (*infra,* p. 29) which, as contained in Section 762, Title 28, U. S. C. reads:

> The plaintiff in any suit *brought* under the provisions of section 41, paragraph 20, of

> this title shall file a petition, * * *. (Italics ours.)

But the emphasis which the petitioner seeks to place upon the single word "brought" ignores the remainder of the clause from which it is taken. It is evident that the clause as a whole simply means that in suits to which the Act applies the specified conditions must be met, but if there were any ambiguity, the construction suggested by the petitioner is manifestly incorrect for the reasons already stated.

5. Two of the four District Court decisions cited by petitioner (Pet. Br. p. 10) were rendered by District Courts in the Second Circuit (*Bennett Day Importing Co.* v. *United States,* 8 F. (2d) 83 (S. D. N. Y.), and *Miller* v. *United States,* 13 F. Supp. 684 (W. D. N. Y.)), and were, therefore, overruled by the decision of the Circuit Court of Appeals of that Circuit in the case at bar. Moreover, the decision in the *Miller* case was rendered by the same District Judge who denied the Government's first motion to dismiss in the present case. Furthermore, it will be noted that the other two decisions (*Mill Creek & Minehill Nav. & R. Co.* v. *United States,* 246 Fed. 1013, and *Provident Trust Co.* v. *United States,* 17 F. Supp. 849), were both rendered by a single District Court.

A number of explanations have been offered of the *per curiam* affirmance on writ of error (251 U. S. 539–540) by this Court of the District Court's decision in the *Mill Creek* case, cited by petitioner

(Pet. Br. pp. 10, 13, 16, 17). Petitioner has offered three explanations (Pet. Br. pp. 16–17), and the court below a fourth, to the effect, in part, that this Court did not decide the question like the one involved here as to whether the United States had been properly brought into court before the statute of limitations had run (R. 32). We think the Circuit Court of Appeals has properly interpreted the case. The *per curiam* disposition of that case upon the authority of *United States* v. *Larkin,* 208 U. S. 333, implies that the question of limitations as to which review by this Court was sought was not within the scope of the statute providing for direct review, which had been construed in the *Larkin* case and, therefore, the affirmance in the *Mill Creek* case would not at all imply concurrence in the conclusion reached by the District Court on a question not involving the jurisdiction of the District Court *as a Federal court.*[6] Moreover, this view appears to be consistent with the fact that this Court's decision does not appear to have been cited on that question in any case so far, although the District Court's decision has been cited in several cases, and was followed in *Bennett Day Importing Co.* v. *United States, supra,* and *Provident Trust Co.* v. *United States, supra.*

[6] Cf. Brief for Defendant in the *Mill Creek* case, No. 103, 1919 Term, p. 19, 251 U. S. 539, citing the *Larkin* case to similar effect.

II

THE GOVERNMENT HAS NOT WAIVED THE DEFENSE THAT THE SUIT WAS NOT BROUGHT IN TIME

It is well settled that statutes waiving the Government's sovereign immunity from suit are to be strictly construed in favor of the United States (*Nichols* v. *United States,* 7 Wall. 122, 126; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Price* v. *United States,* 174 U. S. 373; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *United States* v. *Michel,* 282 U. S. 656, 659) and it has been held that the limitation provisions contained in such statutes, being intended for the protection of the Government, are conditions to the jurisdiction of the court which cannot be waived. This rule has been held to be applicable to the limitation provision in Section 19 (*Lynch* v. *United States,* 80 F. (2d) 418, 419 (C. C. A. 5th), certiorari denied, 298 U. S. 658, rehearing denied, 298 U. S. 692; *United States* v. *Trollinger,* 81 F. (2d) 167, 168 (C. C. A. 4th); *United States* v. *Valndza,* 81 F. (2d) 615 (C. C. A. 6th); *Miller* v. *United States,* 57 F. (2d) 889, 890 (E. D. N. Y.) and to similar provisions as to suits in the Court of Claims (*Finn* v. *United States,* 123 U. S. 227; *DeArnaud* v. *United States,* 151 U. S. 483, 495–496; see also, *United States* v. *Wardwell,* 172 U. S. 48, 52) and in the District Courts under the Tucker Act (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1056 (C. C. A. 2d); *Carpenter* v. *United States,* 56 F. (2d) 828 (C. C. A. 2d)).

See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, where a similar ruling was made as to like provisions in the Interstate Commerce Act. In *Tucker* v. *Alexander,* 275 U. S. 228, 232, it was said, in distinguishing time limitations on suits against the United States from certain provisions intended solely for the convenience of Government officials in the administration of a tax statute, that waivers of the former, if allowed, "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist." See also *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th).

But whether the time limitation on suits under Section 19 goes to the jurisdiction of the court, or is an element of substantive right (as seems to be intimated in *Lynch* v. *United States,* 292 U. S. 571, 587–588),[7] is immaterial, since limitations of the latter kind are not subject to waiver (*Central Vermont Railway* v. *White,* 238 U. S. 507; *Atlantic Coast Line Ry.* v. *Burnette,* 239 U. S. 199, cited in petitioner's brief, p. 12).

Ayers v. *Watson,* 113 U. S. 594, and *Burnette* v. *Desmornes,* 226 U. S. 145, cited by petitioner (Pet. Br. pp. 12, 13), are manifestly distinguishable on the ground that neither of the limitation provisions considered in those cases was an element of substantive right or related to suits against the Government. *United States* v. *Ellison,* 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750,

[7] Compare *Tyson* v. *United States,* 297 U. S. 121, 123.

also cited by petitioner (Pet. Br. p. 13), was a case in which lack of jurisdiction was held not to be disclosed by any facts before the appellate court, and it was apparently considered that the facts establishing jurisdiction had in effect been admitted. Moreover, the decision of the same court in the *Trollinger* case (81 F. (2d) 167), *supra,* shows clearly that it had no intention of holding that the time limitation upon bringing suit would be subject to waiver in a case like the one at bar, where the record affirmatively shows that the suit, if "brought" at all, was not brought in time.

Accordingly, it is clear that the United States Attorney had no authority to waive the requirements of Section 19 as to the time for bringing suit. It is equally clear that the United States Attorney and his assistant had no authority to make the service of summons in the instant case effective to stop the running of the limitation upon suit. The requirements as to procedure for bringing suit, contained in the Tucker Act, are, it is submitted, in the same class with the limitation provisions with respect to the matter of waiver. Like the latter, they are provided for the protection of the Government and unless the interests of the Government might be protected or furthered thereby, as in the waiver of venue, they may not be waived. It would manifestly have been contrary to the interests of the Government to make the venue requirement a condition which

could not be waived, since it might often be more advantageous to the Government to have the suit in a district other than that provided in the statute.

It would be difficult, however, to imagine circumstances under which a waiver of any of the other requirements would be more advantageous to the Government than strict compliance, or, indeed, circumstances under which it would not deprive the Government at least to some extent of the protection intended by Congress to be afforded by such provision. Certainly, to imply the existence of authority in the United States Attorney to waive such requirements would be inconsistent with the evident desire on the part of Congress for uniformity of procedure. Moreover, authority to render the service of a summons or other void proceeding effective to interrupt the running of limitations would cause the United States to lose the protection afforded by the provisions of the Tucker Act against possible nullification of the time limitation in the event the United States Attorney should be derelict in his duty. In short, it is submitted that no statements or conduct on the part of the United States Attorney or his assistant could possibly have conferred validity in any respect upon the service of summons. Moreover, even if it may be assumed that compliance with the requirements, not already complied with, was waived by the filing of the general appearance and answer to the merits on behalf of the Government,

such waiver, it is submitted, could not be effective to restore the plaintiff's privilege of suit, which was lost with the expiration of the limitation period. (*Henry* v. *United States,* 15 F. Supp. 651, *supra;* see also *Spencer* v. *United States,* 14 F. Supp. 46, *supra; Cassarello* v. *United States,* 355 Fed. 326, 328–329).

Farrar & Brown v. *United States,* 3 Pet. 458, cited by petitioner (Pet. Br. p. 15), is distinguishable. There the Attorney General failed to object to the entry of his appearance by the Clerk of the Supreme Court, pursuant to a long established practice, until a subsequent term, and it was held that he had waived the right to object, but the right waived was evidently not derived from a statute granting consent to sue the Government.

Law v. *United States,* 266 U. S. 494, cited by petitioner (Pet. Br. p. 16), is not in point. The suit there was brought under Section 13 of the War Risk Insurance Act, which preceded Section 19 of the World War Veterans' Act, 1924, and did not mention the Tucker Act. See *Crouch* v. *United States,* 266 U. S. 180, which is cited in the *Law* case as authority for the statement quoted by petitioner.

The portions of the opinion of *Lynch* v. *United States,* 292 U. S. 571, quoted by petitioner (Pet. Br. pp. 4–5), were made solely in connection with the holding in that case that war risk insurance policies are contracts creating vested rights. There is no suggestion in the opinion of an intention to

overrule or modify the holding in *United States* v. *Worley,* 281 U. S. 339, to the effect that the rules governing the rights and remedies incident to war risk insurance contracts were intended to be the same as those relating to any other contract entered into by the Government in its sovereign capacity.

Petitioner's contention that the Government is estopped to deny that a suit was commenced by service of the summons is opposed to the well established rule that the Government may not be bound by the acts of its officers or agents contrary to law. (*Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409, and cases cited; *Sutton* v. *United States,* 256 U. S. 575, 579.)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY, 1938.

APPENDIX

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended, as contained in Section 445, Title 38, U. S. C., provides:

> *In the event of disagreement as to claim,* including claim for refund of premiums, *under a contract of insurance* between the Veterans Administration and any person or persons claiming thereunder *an action on the claim may be brought against the United States* either in the Supreme Court of the District of Columbia or *in the district court of the United States* in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. *The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,* and section 765 of Title 28 so far as applicable. * * *
>
> No *suit* on yearly renewable term insurance *shall be allowed under this section unless the same shall have been brought within six years after the right accrued* for which the claim is made *or within one year after July 3, 1930, whichever is the later date,* * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the Veterans Administration of the claim sued upon and the denial of said claim

by the Administrator of Veterans' Affairs, * * * [Italics ours.]

Section 4 of the Act of March 3, 1887, commonly known as the Tucker Act, as amended, provides, as contained in Section 761, Title 28, U. S. C., as follows:

> The course of procedure for the district courts and the Court of Claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the Court of Claims shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Section 5 of the Tucker Act, as contained in Section 762, Title 28, U. S. C., provides:

> *The plaintiff* in any suit brought under the provisions of section 41, paragraph 20, of this title *shall file a petition,* duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other things claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. (Italics ours.)

Section 6 of the Tucker Act, as contained in Section 763, Title 28, U. S. C., provides:

> *The plaintiff shall cause a copy of his petition* filed under section 762 of this title, *to be served upon the district attorney* of the

United States in the district wherein suit is brought, *and shall mail a copy* of the same *by registered letter, to the Attorney General* of the United States, *and shall* thereupon *cause to be filed* with the clerk of the court wherein suit is instituted *an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made* as aforesaid *to appear* and defend the interests of the Government *in the suit and within sixty days after the service of petition upon him,* unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government,* and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. *Should the district attorney neglect or refuse to file the* plea, answer, demurrer, or *defense,* as required, *the plaintiff may proceed with the case under such rules as the court may adopt* in the premises; *but* the plaintiff shall *not have judgment* or decree *for his claim,* or any part thereof, *unless he shall establish the same by proof satisfactory to the court.* [Italics ours.]

Section 10 of the Tucker Act, as amended, provides, as contained in Section 765, Title 28, U. S. C., as follows:

When the *findings of fact and the law* applicable thereto have been filed in any case * * *, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony

taken, *the written findings of the court, and his written opinion* as to the same; * * *

R. S. Sec. 914, commonly known as the Conformity Act, as contained in Section 724, Title 28, U. S. C., provides:

> *Conformity to practice in State courts.*— The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.

FILE COPY

No. 218

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1937

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF

CHARLES B. RUGG,
Amicus Curiae

H. BRIAN HOLLAND,
WARREN F. FARR,
EVERETT H. MAXCY,
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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled suit. The Solicitor General and counsel for the petitioner have assented in writing, as indicated by letters filed with the Clerk of this Court.

This application is made by the undersigned as counsel for the petitioner in the case of *Bates Manufacturing Co.* v. *United States,* now pending before this Court on a petition for a writ of certiorari, October Term, 1937, No. 647.

Respectfully submitted,

CHARLES B. RUGG

January 3, 1937

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed in behalf of Bates Manufacturing Company. That company is plaintiff in a suit to recover alleged over-payments of income and profits taxes, now pending before this Court on a petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, October Term, 1937, No. 647.

In that case, the United States District Court for the District of Massachusetts granted a motion by the Government to dismiss the taxpayer's petition on the ground that the cause of action was barred by the statute of limitations. *Bates Manu-*

facturing Company v. *United States,* 19 F. Supp. 526. On December 8, 1937, the Circuit Court of Appeals (one judge dissenting) affirmed the judgment of the District Court. The taxpayer, on December 24, 1937, filed in this Court its petition for a writ of certiorari.

The question involved in that case is whether a suit against the United States under Section 24 (20) of the Judicial Code (*infra,* p. 30) is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, (*infra,* p. 30) when a petition is filed in the District Court pursuant to Section 5 of the Tucker Act (*infra,* p. 31), or not until a copy of the petition so filed is served upon the United States Attorney pursuant to Section 6 of the Tucker Act (*infra,* p. 31). The taxpayer there duly filed its petition in the District Court, pursuant to Section 5 of the Act, one day prior to the expiration of the period of limitations provided by Section 3226, as amended. Copies of the petition were served on the United States Attorney and mailed to the Attorney General, pursuant to Section 6 of the Act, three days after the close of the limitation period.

In the instant case, the question is whether a suit against the United States under Section 24 (20) of the Judicial Code is brought within the period allowed by the applicable statute of limitations when a summons is issued and served, in accordance with local practice, there having been no compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within that period. Or, stated in more general terms, the question is whether, by virtue of the Conformity

Act (U.S.C. Title 28, Section 724), suits against the Government may be instituted in accordance with the rules of practice and procedure prevailing in the state in which the district court is held. Since in the instant case a petition was not filed, pursuant to Section 5 of the Tucker Act, nor served, pursuant to Section 6 of that Act, within the limitation period, it was not necessary for the court below, and will not, we submit, be necessary for this Court, to decide the question raised in the *Bates Manufacturing Company* case—i.e. whether service of a copy of the petition, in addition to filing the petition, is essential to the beginning of a suit. For, if it be held that the Conformity Act is inapplicable to suits against the United States, that will dispose of the case without more. And, on the other hand, if it be held that the Conformity Act applies to such suits, that also will dispose of the case since, under the law of New York, an action is commenced when a summons is delivered to an officer for service. See *United States* v. *Northern Finance Corp.*, 16 F. (2d) 998 (C.C.A. 2d).

Nevertheless, the court below, after concluding that local practice could not be followed in a suit against the United States, and that the running of the statute of limitations was not stopped by service of a summons, which was decisive of that branch of the case, proceeded to make the following statement (89 F.(2d) 614, 616):

> "As an original question, we should entertain no doubt that . . . the suit cannot be deemed to have been 'brought' until, at the least, a copy of the petition was served on the district attorney".

It seems evident that the question as to the point at which suit is to be deemed "begun" when the procedure prescribed by the Tucker Act is followed exclusively was not necessary to the disposition of the instant case and that the statement quoted above must be regarded as dictum. The Government, however, in support of its contention that service of the summons did not begin the suit, has advanced the affirmative argument that "at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period". (Brief in Opposition, p. 6.) Thus the precise question involved in the *Bates Manufacturing Company* case has seemingly been injected into the instant case.

That question, we submit, is of sufficient importance and complexity to warrant careful consideration. There appears to be no occasion for an exhaustive discussion of it by either of the parties to the present controversy, nor do we conceive that this Court will find it necessary to pass upon it. But inasmuch as the *Bates* case, in which the question is squarely presented, is now pending before this Court on a petition for a writ of certiorari, and since the question has been adverted to in the instant case by the court below and by the Government, we deem it proper to indicate what we regard as the correct approach to the problem. It is our contention that service of a copy of the petition is not essential to the commencement of the suit, and we shall confine our discussion to that issue.

SUMMARY OF ARGUMENT

1. The question to be determined is the construction of the words "begun", "brought" or "commenced" as those terms are used in the applicable statute of limitations. The statutes of limitations themselves do not contain a definition of these terms. Nor does the Tucker Act, prescribing the procedure to be followed in suing the United States in the district courts, expressly state what point in that procedure marks the beginning of the suit. The intention of Congress must, therefore, be determined by recourse to established principles of statutory interpretation. Words are to be given their ordinary meaning unless it is clear that they are intended to have some different significance. In common parlance, the words "begin" and "commence" mean to enter upon, or take the first step in, a course of action. The first step in bringing a suit under the Tucker Act, is the filing of the petition. Service of a copy of the petition so filed is a subsequent step, prescribed by a subsequent section. Taking the language of the applicable statute of limitations in its ordinary sense, and applying it to the procedure defined in the Tucker Act, the filing of the petition marks the beginning of the suit.

2. Other relevant principles of interpretation are that all Acts of Congress must be read in the light of the common law, and that language having a meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. The settled common law rule, both in England and this country, is that an action at law

is "brought" or "begun", within the meaning of the statute of limitations, when the judicial machinery is set in motion—that is, in most jurisdictions, when a writ or summons is issued with an honest intention to prosecute the suit diligently. In equity, where the procedure is more closely analagous to the procedure under the Tucker Act, the suit is commenced when the bill or petition is filed, provided there is no unreasonable delay in the service of the subpoena. Thus in the judicially accepted sense, as well as in common parlance, an action or suit is begun when the first formal step required by the applicable procedure is taken. There is no reason to suppose that in enacting Section 3226 of the Revised Statutes Congress intended to adopt a different rule. This view is further supported by the fact that suit in the Court of Claims under the Tucker Act is "brought" when the petition is filed. There is no apparent reason why Congress should desire the statute of limitations to operate differently depending on the court in which suit is instituted.

3. The rule that, when the United States consents to be sued, the conditions of such consent must be strictly observed is of no assistance in determining what constitutes beginning of the suit. The question is not whether there must be compliance with all the provisions of the Tucker Act, but whether there must be such compliance prior to the expiration of the period of limitations. If the argument as to strict compliance is sound, it logically follows that, before the suit may be regarded as begun, the plaintiff must not only have served the United States Attorney but also mailed a copy of

the petition to the Attorney General and filed an affidavit of such service and mailing. No court has so held. In each case in which the provisions as to mailing a copy of the petition to the Attorney General and filing an affidavit have been in issue, it has been held that those provisions are not jurisdictional and may be complied with or waived after the suit has been instituted.

4. The question is not settled by authority. The courts have tended to confuse the question whether the Conformity Act permits the adoption of local practice in suits against the United States, notwithstanding the provisions of the Tucker Act, with the question whether, if the procedure outlined in the Tucker Act is followed, there must be service in addition to filing the petition within the statutory period. The cases in which the latter question was actually raised for decision are few in number and are based on inconsistent theories and rely on authorities dealing with other issues.

ARGUMENT

I

THE STATUTES IN QUESTION DO NOT EXPRESSLY DEFINE THE BEGINNING OR COMMENCEMENT OF A SUIT UNDER THE TUCKER ACT IN THE DISTRICT COURT, BUT IT IS LOGICALLY TO BE INFERRED FROM THEIR TERMS THAT THE SUIT IS BEGUN WHEN A PETITION IS FILED.

Section 19 of the World War Veterans' Act of 1924 (U.S.C. Title 38, Sec. 445) requires that suits under that section be "brought" within a specified time. Section 3226 of the Revised Statutes, applying to suits for the refund of taxes, provides that such suits must be "begun" within two years after the disallowance of the claim for refund. Other statutes of limitations use the word "commenced". It is clear that all these words have the same meaning. *Goldenberg* v. *Murphy,* 108 U.S. 162, 163. The question in each case is what constitutes the bringing, beginning or commencement of a suit within the meaning of such statutes. It is the statute of limitations which is to be construed.

Those statutes do not contain definitions of their terms. No guidance can be had from them as to what is meant by the bringing, beginning or commencement of a suit. Accordingly we must turn to the statutes having to do with the procedure for bringing suits against the United States to see whether they define at what point in that procedure the suit is to be deemed begun, brought or commenced. If they do, that point marks the institution of the suit for the purposes of the statutes of limitations.

The jurisdiction of the district courts in respect of actions against the United States is defined in

Section 24 (20) of the Judicial Code (*infra,* p. 30). This section, however, does not specify the procedure for bringing or prosecuting such actions. The procedure is set out in Sections 5 and 6 of the Tucker Act (*infra,* p. 31).

Section 5 of that Act provides that "in any suit brought" under the jurisdictional provisions now embodied in Section 24 (20) of the Judicial Code (formerly Section 2 of the Tucker Act) the plaintiff shall file a duly verified petition setting forth the nature of his claim and other specified information. Section 6 provides that the plaintiff shall (1) cause a copy of such petition to be served on the district attorney of the United States in the district wherein suit is brought, (2) mail a copy of the petition to the Attorney General by registered mail, and (3) thereupon file an affidavit of such service and mailing. These sections do not state which, if any, of the prescribed acts marks the beginning of the suit. They do not purport to mark the point at which a suit in accordance with that procedure is to be deemed instituted for purposes of the statutes of limitations or for any other purposes. They are wholly silent on the question. See *Walton* v. *United States,* 73 F. (2d) 15, 17 (C.C.A. 8th); *Spencer* v. *United States,* 14 F. Supp. 46, 47 (D. Mass.); cf. *Creasy* v. *United States,* 4 F. Supp. 175, 179 (W.D.Va.).

Since the procedural statute does not expressly define the beginning or commencement of a suit against the United States, we must seek the intention of Congress by application of the rules of statutory interpretation. It is to be borne in mind that the ultimate question is as to the meaning of

the words "brought", "begun" or "commenced" as used in the applicable statutes of limitations..

It is well settled that words used in a statute are to be given their ordinary or popular meaning unless the statute clearly indicates that they are intended to have some different signification. *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370; *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 327. The words "begin" and "commence", in common parlance, mean to take the first step in, perform the first act of, or enter upon. See *Webster's New International Dictionary* (2d Edition). It is to be assumed, unless the contrary is clearly shown, that Congress used them in that sense. What, then, is the first act or step in suing the United States under the Tucker Act? When may the claimant be said to have entered upon his suit?

If the procedure specified in Sections 5 and 6 of the Tucker Act is followed (passing the question whether that is the only permissible procedure), clearly the first act or step taken is the filing of the petition. Upon the filing of the petition the case is docketed in court, and the nature of the claim becomes a matter of public record. The proceedings have been entered upon in a formal and open manner. In common parlance, the suit has been "commenced" or "begun". See *Burton* v. *Buckeye Ins. Co.*, 26 Ohio St. 467, 469.

Notice to the defendant by serving a copy of the petition on the United States Attorney and mailing a copy to the Attorney General is the second step in the proceedings. As we have pointed out, the Tucker Act does not expressly provide that the suit is not begun until these later steps are

taken. Nor can such a requirement be implied from its terms. The provisions for service, mailing and filing an affidavit thereof are contained in a separate and subsequent section from those having to do with filing the petition. Filing is required by Section 5. Service is provided for in Section 6. This latter section refers to the petition "*filed* under Section 5", to service on the district attorney "in the district wherein the suit is *brought*" and to filing an affidavit with the clerk of the court "wherein suit is *instituted*" (Italics supplied). If any inference is to be drawn from this language, it would seem to be that at the time service, mailing and filing of an affidavit occur the suit has already been brought and instituted. Moreover, this latter section provides not merely for steps to be taken by the plaintiff, but for the steps to be taken by the Government by way of answer, counterclaim and the like, and for the further prosecution of the suit and entry of judgment in the event that the Government neglects or refuses to answer. It seems evident that this section cannot reasonably be construed as purporting to define the steps preliminary to the beginning of the suit, or as laying down a different rule than the normal one, that the first step marks the beginning of the suit.

We submit, therefore, that taking the language of the various statutes of limitations in its ordinary and accepted sense, the action is begun when the petition is filed. This should control unless there are persuasive reasons for reaching the contrary conclusion. We have shown that the language of the Tucker Act itself furnishes no such reason.

We shall endeavor to show that there are no other such reasons, and that, on the contrary, other settled principles of statutory interpretation support our contention.

II

IN THE ABSENCE OF EXPRESS STATUTORY PROVISION IT MUST BE ASSUMED THAT CONGRESS INTENDED NO DEPARTURE FROM THE USUAL RULES GOVERNING THE COMMENCEMENT OF ACTIONS, AS ESTABLISHED BY COMMON LAW AND OTHER PRECEDENTS. THESE DO NOT REQUIRE THAT SERVICE BE EFFECTED BEFORE THE STATUTE OF LIMITATIONS HAS RUN.

It is an established rule of statutory interpretation that all acts of Congress must be read in the light of the common law, from which our system of jurisprudence is derived. *United States* v. *Sanges,* 144 U. S. 310. Moreover, language having an accepted meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. *Kepner* v. *United States,* 195 U.S. 100. Accordingly, since Congress has failed to define the bringing or beginning of a suit, within the meaning of the statutes of limitations governing suits under the Tucker Act, it must be presumed to have intended that the words "brought" and "begun" be taken in their judicially accepted sense, if that differs from common usage.

The common law rule as to what constitutes the beginning of an action, for the purposes of statutes of limitations, is correctly stated on page 7 of the Government's Brief in Opposition as follows:

> "Under the common law both in England and in this country, actions were commenced by the issuance of a writ with a bona fide in-

> tention to make service thereof (Angell on Limitations, 6th Edition, Sections 311, 312, 318). . . ."

See *Brown* v. *Babbington,* 2 Ld. Raymond 880; *Parsons* v. *King,* 7 Term Rep. 6; Wood on Limitations (4th Edition), Sec. 289.

The issuance of a writ being the first step in the proceedings, the action was deemed to have been commenced when that step was taken.

The same rule appears to have been followed in most of our states in the absence of express statutory provisions. Although in some cases it has been considered that the writ is not "issued" until placed in the hands of an officer for service (see *United States* v. *Northern Finance Corp.* 16 F. (2d) 998, 999 (C.C.A. 2d); *Bradford Estate Co.* v. *Brown,* 52 R.I. 103), it has commonly been held that the date on which the writ is made out, and not the date on which it is delivered for service, is *prima facie* the date of the commencement of the suit. Such, for example, is the rule in Massachusetts, *Gardner* v. *Webber,* 17 Pick. 407; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; in New Hampshire, *Mason* v. *Cheney,* 47 N.H. 24; *Anderson* v. *Aetna Life Ins. Co.,* 75 N.H. 375; in Maine, *Johnson* v. *Farwell,* 7 Greenleaf 370; *Biddeford Savings Bank* v. *Mosher,* 79 Me. 242; and in Vermont, *Day* v. *Lamb,* 7 Vt. 426; *Tracy* v. *Grand Trunk Ry. Co.,* 76 Vt. 313. In other jurisdictions, such as Pennsylvania, where the writ is not made out by the plaintiff himself, but is issued upon the filing of a praecipe, the action is deemed commenced when the praecipe is filed. *Gibson* v. *Pittsburgh Transpor-*

tation Co., 311 Pa. 312; *Ledonne* v. *Commerce Ins. Co.* 307 Pa. 1.

In equity we find the same principle applied, doubtless by analogy to the common law rule. The proceeding is deemed to be begun when the first formal step is taken, and not only after service has been had. The equity rule is succinctly stated in *Mound City Co.* v. *Castleman*, 187 Fed. 921 (C.C.A. 8th) at 925:

> "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process".

Such has long been the rule in England, since it was provided in 4 Anne, c. 16, Sec. 22 that the bill must be filed before process will issue. *Coppin* v. *Gray*, 1 Y. & C. 205; see also *Purcell* v. *Blennerhasset*, 3 Jo. & Lat. 24. And it is now firmly established in the federal courts in this country. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51; *United States* v. *Hardy*, 74 F. (2d) 841 (C.C.A. 4th); *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, 184 Fed. 199 (C.C.A. 8th); *Equitable Life Assurance Society* v. *Schwartz*, 42 F. (2d) 646 (C.C.A. 5th); *Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co.*, 21 F. (2d) 589 (W.D.N.Y.): *Humane Bit Co.* v. *Barnet*, 117 Fed. 316 (C.C.D.N.J.). While it is sometimes broadly stated that not only must the bill be filed, but the subpoena must also be lodged with the proper officer for service (see *United States* v. *American Lumber Co.*, 85 Fed. 827 (C.C.A. 9th);

United States v. *Miller,* 164 Fed. 444 (C.C.D. Ore.); *United States* v. *Northern Finance Corp.,* 16 F. (2d) 998, 999 (C.C.A. (2d)), it has been held in the cases in which the point has squarely arisen for decision that the mere filing of the bill stops the running of the statute. *United States* v. *Hardy, supra; Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co., supra;* cf. *Armstrong Cork Co.* v. *Merchants' Refrigerating Co., supra.* And the cases all agree that the suit is commenced at a point short of service of the subpoena.

Whether a proceeding be at law or in equity, the normal rule is, therefore, that it is commenced, at least so far as the statute of limitations is concerned, before the defendant has been served and had notice of the suit. And the same rule has been incorporated into the statutes governing procedure in many of the Code states. See *Domenech* v. *Verges,* 69 F. (2d) 714, 717 (C.C.A. 1st); *Nash* v. *El Dorado County,* 24 Fed. 252 (C.C.D. Cal.). This principle is, of course, subject to the proviso that the plaintiff must have had a *bona fide* intention to prosecute his suit diligently and must in fact have procured service on the defendant within a reasonable time after the first step in the proceeding has been taken. Failure to effect service within a reasonable time will be taken as evidence of lack of good faith in suing out the writ or filing the bill (see *Pierce* v. *Tiernan,* 280 Mass. 180, 181), but if the action is diligently prosecuted, it dates from the time the writ is issued or the bill filed.

There is a close analogy between the procedure defined in Sections 5 and 6 of the Tucker Act and the procedure in equity cases. Both involve the

filing of a bill or petition before it is served on the defendant. It is clear that in equity neither the bill nor the subpoena need be served before the period of limitations has run. No reason appears why the petition under the Tucker Act should be served within the statutory period.

While the Tucker Act does not expressly provide for the issuance of a writ or summons, there is an analogy between the filing of a petition under that Act, where the statutory procedure is exclusively followed, and the issuance of a writ at common law, in that the filing of the petition, like the suing out of the writ, is the first formal step taken by the plaintiff.[1] The filing of the petition is, perhaps, the more significant since it places on record the nature of the claim.

The statutory provisions relating to actions brought in the Court of Claims lend cumulative support to our contention that the filing of the petition, when that is the first act performed by the plaintiff, should be regarded as the beginning of a suit under the Tucker Act. The jurisdiction of district courts under that Act is concurrent with that of the Court of Claims. See Section 24 (20) of the Judicial Code (*infra*, p. 30). Except for a limitation as to the amount in controversy, and special jurisdictional statutes governing particular classes of cases, a claimant may bring suit in either court.

Section 1069 of the Revised Statutes, which antedated the Tucker Act, provided that a petition in

[1] The Court of Claims has held that a petition filed in that court performs the functions of both declaration and process, and the same would appear to be true of petitions filed under the Tucker Act. *Duran* v. *United States*, 31 C. Cls. 353, 358.

the Court of Claims must be filed within six years after the claim first accrued. The Tucker Act, which applied to both the Court of Claims and the district courts, provided in Section 1 (24 Stat. 505) that no suit against the United States should be allowed under that act unless "brought" within six years after the right accrued. Reading that section in the light of Section 1069, it is clear that suit in the Court of Claims was regarded by Congress as "brought" when the petition was filed. And that is clearly the rule today. Section 156 of the Judicial Code (U.S.C., Title 28, Sec. 262). It is difficult to perceive any reason why Congress should desire statutes of limitations on suits against the Government to operate differently depending on the court in which suit is instituted. See *Greathouse* v. *United States*, 166 U. S. 601, 606.

We are unable to find any logical explanation for the statement of the court below that an action of this character is not begun until a copy of the petition is served on the United States Attorney. The statutes do not require that interpretation. Such inferences as may be drawn from them indicate otherwise. In common parlance a suit is begun when the first formal act is performed. Neither at common law nor in equity is service deemed essential to the commencement of an action. And federal statutes governing other kinds of proceedings in which the filing of a petition is the first step make it clear that in those proceedings the action is commenced when the petition is filed.[2] We submit that the statutes of limitations

[2] Compare Section 1 of the Bankruptcy Act of 1898, as amended (U.S.C., Title 11, Section 1), where Congress expressly provided that the filing of a petition in bankruptcy marks the commencement of the proceedings.

in question must be interpreted in the light of these authorities. There are no grounds for assuming that Congress intended to lay down a new and different rule.

III

THE ARGUMENTS ADVANCED BY THE GOVERNMENT IN SUPPORT OF ITS CONTENTION THAT A SUIT UNDER THE TUCKER ACT IS NOT "BROUGHT" UNTIL A COPY OF THE PETITION HAS BEEN SERVED ON THE UNITED STATES ATTORNEY ARE UNSOUND.

A.

In its Brief in Opposition to the petition for certiorari (p. 6) the Government asserts that the "decision" of the court below to the effect that "at least" the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period finds support in the rule that, when the United States consents to be sued, the conditions of such consent must be strictly observed. That rule is, of course, a familiar one. We submit, however, that the attempt to invoke it as determinative of the instant question involves fallacious reasoning.

Conceding, for the purposes of argument, that a claimant suing the United States under the Tucker Act must comply with all the requirements of that Act, the question still remains as to when such compliance must take place. Even if we admit that there must be strict compliance, it does not follow that *all* of the prescribed steps must be taken before the period of limitations has run. Nor does it follow that any one of the steps subsequent to the

first step of filing the petition must be taken within the limitation period. The argument of strict compliance is of no assistance in determining the question as to what marks the beginning of the suit.

Moreover, if the Government's argument were sound, it would be necessary to hold that *all* of the requirements of Section 5 and 6 of the Tucker Act must be satisfied within the statutory period. But the Government does not follow the argument to its logical conclusion, and the courts have likewise declined to do so. The court below said that in its opinion there must "at least" be service on the United States Attorney, but did not suggest that a copy of the petition must be mailed to the Attorney General and an affidavit of service filed in order to commence the suit. Yet these latter requirements are contained in the same section and in the same sentence of that section as the requirement for service, and appear to be equally mandatory. No reason is suggested why one of the requirements of Section 6 must be met and the others may be disregarded. The Government, in its Brief in Opposition (p. 6), follows the language of the court below. There is a suggestion at page 7 that the plaintiff must mail a copy of his petition to the Attorney General before the statute has run, but it is nowhere suggested that the affidavit of service must also be filed before that time.

We have found no decision which follows the Government's argument to its logical conclusion. On the contrary, it has been held by several of the lower federal courts that the mailing of a copy of the petition to the Attorney General and the filing of an affidavit of service are not mandatory

but may be waived, or complied with—if insisted upon—after the proceedings have been commenced. *Little* v. *United States,* 54 F. (2d) 711 (W.D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M.D., N.C.); *Irving Trust Co.* v. *United States* (S.D. N.Y.) not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States,* (N.D.Ohio) not officially reported, but found in 1936 C. C. H. Federal Tax Service, Vol. 4, par. 9072; *Hostetter* v. *United States* (W. D. Pa.) not officially reported, but found in 1937 C. C. H. Federal Tax Service, Vol. 4, par. 9436. The question of limitations was squarely before the court in the *Irving Trust Co.* case, *supra,* and appears to have been involved in the *Wilhelm* case, *supra,* although not clearly referred to in the opinion. See also, *United States* v. *Hvoslef,* 237 U. S. 1, and *Griffin's Case,* 13 C. Cls. 257. In the latter case the Court of Claims held that the plaintiff's failure to verify his petition, as required by Section 159 of the Judicial Code (U. S. C., Title 28, Sec. 265), which is similar in this respect to Section 5 of the Tucker Act, is a mere procedural defect which may be cured even after the statute of limitations has run.

These decisions support our contention that the principle requiring strict compliance with the conditions imposed upon suits against the Sovereign is irrelevant to the question of what constitutes the beginning of such a suit for the purposes of statutes of limitations. So far as the terms of the Tucker Act are concerned, each procedural step prescribed is of equal dignity with every other step. The principle of strict compliance does not war-

rant the singling out of any one or more of those steps as marking the commencement of the suit. If such an interpretation of the act is to be justified, it must be on some other grounds.

B.

It may be suggested that compliance with all of the requirements of Sections 5 and 6 of the Tucker Act is a prerequisite to the vesting of jurisdiction in the court, and that the statute of limitations is not satisfied until jurisdiction has vested. But the authorities just cited, *supra,* p. 22, show that the court may acquire jurisdiction even though there has not been strict compliance with Sections 5 and 6. Moreover, the acquisition of personal jurisdiction by service on the defendant is not normally regarded as essential to the commencement of an action. *United States* v. *Chase Securities Corp.,* 24 F. (2d) 500 (C.C.A. 1st); *Taylor* v. *Southern Ry. Co.,* 6 F. Supp. 259 (E. D. Ill.); *Schroeder* v. *Merchants' & Mechanics' Insurance Co.,* 104 Ill. 71; *Vincent* v. *McElvain,* 304 Ill. 160. Cf. *Domenech* v. *Verges,* 69 F. (2d) 714 (C.C.A. 1st).

The jurisdictional character of the statute of limitations itself is, we submit, wholly irrelevant. True, the court would be without jurisdiction if the bar of the statute had fallen, but the very question at issue is whether it has fallen.

IV

THE QUESTION IS NOT SETTLED BY AUTHORITY. THE CASES RELIED ON ARE NOT PERSUASIVE NOR DETERMINATIVE OF THE ISSUE.

As the court below observed, the authorities on the question of how and when a suit under the Tucker Act is commenced "are in some confusion". *Munro* v. *United States,* 89 F. (2d) 614, 616. Most of the cases dealing with that broad issue have turned on the question whether the procedure defined in Sections 5 and 6 of the Tucker Act is exclusive or whether the Conformity Act permits the adoption of local practice in suits against the United States. On that point there is a diversity of opinion among the lower courts, which the decision in the instant case will doubtless resolve. The confusion on this issue, however, has been carried over into the question presented by the *Bates* case—whether, if the procedure outlined in the Tucker Act is followed, there must be service in addition to filing the petition to avoid the bar of the statute of limitations. The confused and, we submit, fallacious reasoning in cases involving this latter question has been due in large measure to the tendency of the courts to treat authorities holding the Conformity Act inapplicable to suits against the United States as controlling. Authorities on the one point are commonly cited as authorities on the other. No court seems carefully to have analyzed the question. The result has been the development of a body of dicta, which, we submit, were ill considered, to the effect that service of a copy of the petition is essential to the commencement of a suit for the purposes of the

statute of limitations. Yet the cases in which the question was actually raised for decision are few in number and are themselves based on differing theories and rest on authorities dealing with other issues.

One of the cases most commonly relied upon as authority for the proposition that service of a copy of the petition must be made within the statutory period is *Reid Wrecking Company* v. *United States,* 202 Fed. 314 (N.D. Ohio). But in that case the statute of limitations does not appear to have been in any way involved. The sole point raised was whether monitions should be quashed in admiralty proceedings on the ground that the proceedings were not brought "in the district where the plaintiff resides", as required by Section 5 of the Tucker Act, the point having been timely raised by the Government.

In addition to the *Reid* case, a group of cases involving the application of the Conformity Act are often treated as controlling authorities. In *National Casket Company* v. *United States,* 263 Fed. 246 (S.D. N.Y.) and *Cassarello* v. *United States,* 265 Fed. 326 (N.D. Pa.) motions to quash service of summons, made in accordance with local practice, were granted on the ground that local practice was inapplicable. The courts had no occasion to, and did not, discuss which of the procedural steps prescribed by the Tucker Act mark the beginning of the suit for purposes of the statute of limitations. The same point was all that was raised in *Miller* v. *United States,* 11 F. Supp. 924 (W.D.N.Y.), where the service was similarly

quashed. The court did express the opinion that service of a copy of the petition should mark the commencement of the suit, but that was not necessary to the decision. In *Henry* v. *United States,* 15 F. Supp. 651 (M.D.Pa.) the question involved was the same as that in the instant case. Like the court below, the court in that case stated that the time of service of the petition determines when the action is commenced, a statement which, we submit, was an unnecessary dictum.

A case touching somewhat upon the problem and relied upon by the District Court in the *Bates Manufacturing Company* case is *Spencer* v. *United States,* 14 F. Supp. 46 (D. Mass.). There it was held that an action against the United States was not commenced by the mere signing and verification of a petition. The plaintiff in that case had died before the petition was filed, and the action was held to have abated with his death. Although the court stated that the federal courts had uniformly held that suit against the Government is not begun until the petition is served upon the United States Attorney, that question was obviously not in issue.

We have found only three cases in which that question was squarely presented for decision.[3] The first of these cases is *Creasy* v. *United States,* 4 F. Supp. 175 (W.D. Va.), where it was held that the filing of a petition did not satisfy the statutes of limitations applicable to suits on policies of war risk insurance, when service was not effected until two days after the period had run. The reason-

[3] We do not include here the decision of the Circuit Court of Appeals in the *Bates Manufacturing Company* case.

ing of the opinion, we submit, is reflected in the following three quotations (p. 179):

1. "It is provided in title 38, §445, U.S.C., 38 USCA §445 (by reference to title 28, §763), that suit shall be begun by causing a copy of the petition to be served upon the district attorney of the United States in the district where suit is brought, and causing an affidavit of such service to be filed with the clerk of the court."

2. "It has been held (Reid Wrecking Co. v. U.S. (D.C.) 202 F. at page 317) that the requirement of service upon the district attorney is mandatory; that, suits against the United States being solely by its permission, the procedure prescribed in the grant of such permission must be literally followed, and that courts cannot permit deviation from the letter of such consent."

3. "In my opinion, the filing in the clerk's office on May 11th of a copy of the petition does not affect the situation. The statute provides that what shall be filed with the clerk is an affidavit showing service of the petition on the district attorney."

It is to be observed that the court completely ignores Section 762 of title 28, which is also referred to in Section 445 of title 38, and which, when read in conjunction with Section 763, requires the filing of a verified petition before a copy of such petition is served on the United States Attorney. Moreover, we submit that the first excerpt quoted above from its opinion is wholly inaccurate and completely begs the question. Nowhere in Section 763 is there a provision that "suit shall be begun

by causing a copy of the petition to be served upon the district attorney".

The second case is *Walton* v. *United States,* 73 F. (2d) 15 (C.C.A. 8th). There a petition was filed in time, but no service was made until after the statutory period had expired. The court not only held that there was no express provision in the Tucker Act defining the beginning of a suit, but found no implication in the language of the Act in regard to that question, for it concluded that in the absence of a controlling act of Congress the question must be determined by the local law. Since the local statute provided that a civil action was commenced by service of a summons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney.

The third case is *Bachmann, Emmerich & Co. Inc.* v. *United States* (S.D.N.Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. That was a tax refund suit, in which the petition was seasonably filed but not served until a few days after the statute had run. The court granted a motion to dismiss, on the theory, which we have urged is erroneous, that since there must be strict compliance with the statutory provisions all of the requirements of Sections 5 and 6 of the Tucker Act must be met before the suit can be regarded as commenced, relying on the *Reid Wrecking Co., Creasy, National Casket Co.,* and *Cassarello* cases, all of which we have discussed above.

The foregoing review of the decisions amply confirms the statement of the court below in the in-

stant case as to the confused state of the authorities. Agreement among them is found, however, on one point, namely that no statute expressly defines what shall constitute the commencement of a suit against the United States in the district courts. We submit that none of the decisions contain clear or logical expositions of the reasons for holding that service of a copy of the petition marks the beginning of the suit for purposes of the statute of limitations.

With one Circuit Court of Appeals holding that local statutes determine the time of commencement of a suit against the United States, and two district courts proceeding on the strict compliance theory, it is evident that the law is far from settled. Dicta in other cases involving the applicability of the Conformity Act do not clarify the problem. It is submitted that the question merits and requires careful re-examination at such time as it may properly come before this Court.

Respectfully submitted,

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APPENDIX

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 24 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 41), derived from Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505:

"SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * * * *

"Twentieth. Concurrent with the Court of Claims, * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * * * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * "

* * * * * * * *

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506 (U.S.C., Title 28, Secs. 762 and 763):

"SEC. 5. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

"SEC. 6. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and

shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. . . . ."

SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1937.

Leo N. Munro, Petitioner, vs. The United States of America. } On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 31, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Certiorari was granted because of conflicting views in the lower courts.

Claiming to be permanently and totally disabled, petitioner instituted an action in the United States District Court, Western District of New York, to recover under a War Risk Insurance Policy. He was honorably discharged in 1919.

Before the cause came on for trial respondents moved for dismissal because the action was not brought within the time prescribed by Sec. 19, World War Veterans Act 1924, as amended by Act July 3, 1930, 46 Stat. 992, copied in the margin.[1] This motion was overruled. Whether properly so, is the matter for our consideration.

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[1] Act of July 3, 1930, c. 849, 46 Stat. 992.

Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled 'An Act to provide for the bringing of suits against the Government of the United States,' approved March 3, 1887, and section 10 thereof so far as applicable. . . .

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made; Provided, that for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this

By concession it was necessary to bring suit not later than July 1, 1933.

March 16, 1933, a praecipe for issuance of summons was filed wtih the Clerk of the District Court; on the same day copy of the summons was served upon the United States Attorney in Buffalo and another mailed to the Attorney General at Washington; no copy of the complaint was served upon the United States Attorney until July 26, 1933; the original complaint was not filed with the Clerk until April 23, 1936.

February 15, 1934, the United States Attorney filed an answer without questioning the timeliness of the suit; a year later he moved to dismiss. The cause was heard in April, 1936; judgment went for the assured July 29, 1936.

In following the above described procedure petitioner's counsel acted upon information given by the Assistant United States Attorney, who declared that service of summons would suffice to give jurisdiction and toll the statute; that complaint might be served thereafter.

Two points are presented. Did procuring the summons, serving one copy on the United States Attorney and sending another to the Attorney General begin the suit within the requirement of the

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limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. . . .

Tucker Act, March 3, 1887.

Sec. 5 (U. S. C. A., Title 28, Sec. 762).

Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Sec. 6 (U. S. C. A., Title 28, Sec. 763).

Service; appearance by district attorney: The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, . . .

statute? If not, do the circumstances establish waiver of the defense that suit was out of time.

Section 19, Act of 1924, permits an action on a War Risk policy to be brought in the United States District Court for the district in which the claimant resides. Also directs, "The procedure in such suits shall be the same as that provided in Sections 5 and 6" (Sections 762 and 763, Title 28, U. S. C. A.) of the Tucker Act of March 3, 1887, "and Section 10 thereof [Sec. 765, Title 28, U. S. C. A.] insofar as applicable." Sec. 5 of the Tucker Act provides that the plaintiff "shall file a petition" with the Clerk of the court containing a succinct statement of the facts upon which the claim is based; Sec. 6 that he shall cause one copy of this to be served upon the District Attorney and mail another to the Attorney General. These requirements were not complied with prior to July 1, 1933.

The Circuit Court of Appeals held the suit was not brought in time to toll the statute, and with this conclusion we agree. The opinion there adequately refers to the sundry opinions which have considered the subject, discloses the claims of the parties and reasons for the judgment.

Affirmation here, upon authority of *United States* v. *Larkin*, 208 U. S. 333, of the District Court's judgment in *United States* v. *Mill Creek, etc.*, and two similar causes (Nos. 103, 104, 105, Oct. Term 1919,) 251 U. S. 539, cannot properly be regarded as authority for a view contrary to the one we now approve. Those causes came up under a statute which permitted direct appeals from District Courts solely upon questions of jurisdiction. We determined only that the District Court had power to hear and rule upon the questions presented to it—among them whether the suits were brought in time. The merits of the controversy—whether in reality the suits were in time—we did not consider. Examination of the opinion in Larkin's case and the statute then in force will make this clear enough.

Suits against the United States can be manitained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reid* v. *United States*, 211 U. S. 529, 538. The Conformity Act cannot be relied upon to change any of these.

The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Finn* v. *United States,* 123 U. S. 227, 233. Judgment against them is not permissible if first sought after expiration of the time allowed.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.